No. 90-462

In The

Supreme Court of the United States

October Term 1990

JAMES THOMAS SLOAN, JR., FREDRICK J. FARRER AND GARY C. NEWTON,

Petitioners,

vs.

G & G MANUFACTURING INC., A NEBRASKA CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Plaintiffs Harold and Jean Mann[1] filed suit to recover for injuries to Harold Mann's left leg and hip and right leg. He was operating a grain auger at his farm on November 9, 1982 when his clothing caught on a burr on the grain auger's power takeoff (PTO) shaft. His clothing became entangled and wrapped around the uncovered PTO shaft, causing his injuries.

Prior to filing suit, Petitioners, as plaintiffs' counsel, took a number of statements which revealed two facts central to G & G Manufacturing, Inc.'s (hereinafter "G & G")[2] later defense:

1) During the entire time plaintiffs owned the auger, the PTO shaft had been substantially uncovered, and thus effectively unguarded. (App. 1) The previous owner who had purchased the auger stated that the guard had been incomplete while he owned it. (App. 3)[3]

2) Both Petitioners and the local police chief noticed a sharp projection on the uncovered portion of the PTO shaft. It appeared that Harold Mann's clothing got caught on this

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[1] Petitioners in this proceeding, James Thomas Sloan, Jr., Fredrick J. Farrer and Gary C. Newton, were plaintiffs' counsel in the underlying lawsuit and were sanctioned for Rule 11 violations. Plaintiffs' claims were dismissed voluntarily with prejudice and plaintiffs no longer are parties to these proceedings.

[2] Pursuant to S.Ct.R. 29.1, G & G discloses that it has no parent or subsidiary companies.

[3] References to the Appendix to this Brief in Opposition are "App." followed by the page number. References to Petitioners' Appendix are "A" followed by the page number.

burr. (App. 1-2, 6-8) The police chief later submitted an affidavit to the district court confirming this initial observation. (App. 9)

On or about February 27, 1984, plaintiffs filed a product liability action against the Hutchinson Division of Lear Siegler, Inc. (hereinafter "Hutchinson"), the manufacturer of the Mann grain auger. During discovery, Petitioners learned that Hutchinson does not manufacture its own PTO shafts, but instead purchases all of its PTO shafts from G & G. (A 42-43) However, two Hutchinson employees deposed on April 8, 1985 stated that the Mann PTO shaft was *not* a G & G shaft and provided specific reasons upon which they based their conclusion. (App. 12, 18)

During discovery conducted prior to G & G's joinder in this lawsuit, Hutchinson deposed plaintiff Harold Mann on March 28, 1985. He testified that, having a great deal of experience operating farm machinery, he knew why farm machinery was guarded and that it was a good, safe practice to keep loose clothing away from moving parts. He further testified that he realized prior to his accident more than half of the guard assembly on the shaft was missing, that he knew the entire shaft was meant to be guarded, that he recognized that the auger was less safe without a guard, and that his clothing could get caught on the moving shaft. Finally, he testified that had the entire shaft been properly guarded, the accident would have been less likely to occur, perhaps not even occurring at all. (App. 21)

In spite of the information showing that G & G did not manufacture the PTO shaft, that Harold Mann fully appreciated the risks inherent in operating an unguarded

PTO shaft, and that his initial point of contact with the moving shaft was the projection on the unguarded section of the shaft which snagged his clothing, Petitioners amended plaintiffs' Complaint on or about June 14, 1985 and added G & G as a defendant. (A 49-53)

G & G answered the Amended Complaint on or about October 22, 1985. On November 14, 1985, Petitioners noticed the deposition of several G & G officials for Omaha, Nebraska on December 17, 1985. Petitioners sought testimony on six broad topics, most of which were unrelated to the subject PTO shaft and partial guard remnant, and the production of a very large number of documents. Several copies of photographs showing virtually no detail of the PTO shaft accompanied the notice.

By letters dated November 18 and December 11, 1985, G & G protested scheduling the deposition before G & G officials could inspect the auger or, in the alternative, inspect clear photographs of the PTO shaft. (App. 30, 32) Twice Petitioners refused to provide G & G with either the photographs themselves or reprints, forcing G & G to obtain the reprints on an expedited basis and for an increased price. Receiving the photos in Omaha by Federal Express, G & G officials reached a preliminary conclusion that the shaft in question was not a G & G product. Petitioners agreed to postpone the December 17, 1985 deposition only when counsel for G & G flatly refused to produce a G & G representative until after they had inspected the PTO shaft.

On January 21, 1986, G & G product safety representative James Hergert traveled from Omaha to Constantine, Michigan to inspect the auger. While in Michigan,

Mr. Hergert openly discussed the results of his examination with Petitioners: G & G had not manufactured any part of the PTO shaft; instead, the shaft had been "cannibalized," or assembled, from parts from a number of different PTO shafts. Petitioners then rejected G & G's offer that Mr. Hergert be deposed in Constantine that day.

Seeking to avoid the expense of an unnecessary trip to Omaha, counsel for G & G wrote Petitioners on January 22, 1986. (App. 36) The letter explained Mr. Hergert's position and offered a sworn affidavit containing his anticipated testimony. Furthermore, the letter stated that examination at the depositions would be strictly limited to the issue of whether G & G designed, manufactured or distributed the PTO shaft, that G & G would produce documents relating to that issue only and that G & G intended to seek Rule 11 sanctions. Nevertheless, Petitioners demanded and conducted the depositions in Omaha. The witnesses testified as expected: G & G had not designed, manufactured or distributed the PTO shaft. (App. 40, 45)

Displeased with the limits on discovery set by G & G, Petitioners filed a motion to compel discovery beyond the issue of whether G & G designed, manufactured or distributed the shaft. The magistrate ruled in G & G's favor on April 14, 1986, limiting discovery to whether G & G manufactured the PTO shaft. (App. 51) In addition, the magistrate warned Petitioners that sanctions might be appropriate. (App. 53) This Order, dated May 12, 1986, was affirmed by the district court on October 15, 1986. (App. 56)

On or about December 16, 1986, Petitioners again noticed depositions of G & G officials in Omaha. Once again, in a January 2, 1987 letter, counsel for G & G

objected to the depositions as an unnecessary expense and informed Petitioners of G & G's intention to seek sanctions. (App. 59)

On January 15, 1987, a hearing was held on Hutchinson's motion for a protective order seeking to prevent Petitioners from obtaining any additional documents. The judge granted the motion and stated in relevant part:

> *[T]he uncontradicted evidence is overwhelming that* all of the PTO shafts and guards obtained by [Hutchinson] for this type of auger came from G & G Manufacturing, and that *the PTO shaft* attached to this particular auger (which was apparently a cannibalized PTO shaft attached by persons unknown) *was not a G & G product.*

January 15, 1987 Protective Order, p. 2 (emphasis added). (App. 62)

Based on this Order, counsel for G & G informed Petitioners on January 20, 1987 that G & G would produce no additional documents at the Omaha depositions scheduled for February. (App. 66)

G & G conducted its own deposition of Harold Mann on February 2, 1987. Mr. Mann's testimony paralleled the statements he made to his own counsel before they filed the Amended Complaint against G & G. (App. 68)

This case was mediated on February 16, 1987 pursuant to W.D. Mich. R. 42 (A 30-37). Although both Hutchinson and G & G accepted the mediation award, Petitioners rejected it as to both defendants. Following mediation, counsel for G & G informed Petitioners by letter dated March 11, 1987 of G & G's intention to seek mediation sanctions, if appropriate. It was estimated that

G & G's costs from mediation through trial would be from $15,000.00 to $20,000.00. (App. 77)

Both Hutchinson and G & G moved for summary judgment. On April 9, 1987, the trial court granted Hutchinson's motion and denied G & G's. Even so, the judge specifically stated that a directed verdict would be appropriate if Petitioners' proofs were insufficient. (A 63)

Discovery continued after the hearing on the summary judgment motions. G & G deposed Petitioners' primary expert, Wesley Buchele, in Waterloo, Iowa on April 11, 1987. Dr. Buchele opined that G & G's partial guard remnant had not "lasted long enough" and accused his own client, Harold Mann, of lying in his deposition testimony. (App. 79) Next, Petitioners deposed G & G's expert, Dale Gumz, who carefully and cogently explained why Harold Mann could blame no one but himself for his injury. (App. 89) The final deposition was conducted on December 4, 1987, when Petitioners examined G & G's other expert, William Field, in Lafayette, Indiana. Dr. Field, generally recognized as the country's most knowledgeable expert in the field of farm equipment injury investigation, confirmed every aspect of Mr. Gumz's testimony. (App. 91)

On April 23, 1987, counsel for G & G once again wrote to Petitioners, reaffirming G & G's intention to seek sanctions against Petitioners for filing and maintaining a meritless suit. (App. 93) Petitioners immediately filed a "Notice of Withdrawal of Mediation Rejection" the following day, attempting to withdraw plaintiffs' rejection of the mediation award and accept the two month old award. (A 66) G & G objected to this obvious attempt at

avoiding mediation sanctions and filed a motion to strike the notice. (A 67) The trial court granted G & G's motion on June 24, 1987. (A 70)

At the final pretrial conference held on December 10, 1987, counsel for G & G repeated G & G's intention to seek sanctions. G & G reiterated its intentions in a December 22, 1987 letter explaining that it would seek sanctions in an amount equaling its costs, then estimated at $37,000.00. (App. 97)

Less than three weeks before the January 19, 1988 trial date, Petitioners moved for voluntary dismissal on December 30, 1987. They sought to condition it upon the assessment of only $500.00 in costs. (A 72) Although not objecting to voluntary dismissal, G & G did object to an award of only $500.00. (A 73-74)

At a January 12, 1988 hearing, the trial court granted the motion for voluntary dismissal but reserved the issue of the amount of costs to be assessed at a later date. The order of voluntary dismissal was entered on February 5, 1988. (A 75-76)

On April 26, 1988, on G & G's motion, the trial court ruled that Petitioners had violated Rule 11. Accordingly, the trial court imposed sanctions of $40,487.61, the entire cost of defending the action, against those attorneys, as well as their law firms, who had actively participated in pursuing the claim. (App. 100) On April 12, 1990, the Court of Appeals for the Sixth Circuit affirmed the imposition of sanctions, but reversed the sanctions imposed on the law firms and remanded for a recalculation of the sanctions to be imposed upon each individual attorney. *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 961 (6th Cir. 1990).

The Sixth Circuit denied a petition for rehearing and a suggestion for rehearing *en banc* on May 24, 1990.

REASONS FOR DENYING THE WRIT

This case presents no new interpretations of Rule 11 or the cases construing Rule 11. The Sixth Circuit's decision was correct in upholding sanctions for an egregious violation of Rule 11. Plaintiffs' Amended Complaint was not well-grounded in fact and did not reflect the level of prefiling inquiry required by Rule 11. In fact, the Amended Complaint reflected a total disregard of the facts available to Petitioners at and before the filing of the Amended Complaint.

I. LAWYERS MAY NOT AVOID SANCTIONS UNDER RULE 11 SIMPLY BECAUSE THEIR PLEADINGS SURVIVE A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

A. Rule 11 and Rule 56 have different analyses such that a finding under Rule 56 does not preclude sanctions under Rule 11.

Petitioners incorrectly state that the Sixth Circuit in the case below implicitly interpreted Rule 11 and Rule 56 as interrelated. In actual fact, the Sixth Circuit *explicitly* stated that it was not required to determine the propriety of the district court's denial of summary judgment; it need only concern itself with examining the district court's imposition of sanctions on Petitioners. *Mann*, 900 F.2d at 961. This statement by the Sixth Circuit can hardly be interpreted as meaning the two rules are interrelated.

Rather, the Sixth Circuit's explanation of its analysis stops just short of saying the two rules operate independently of one another and a finding under one cannot influence a finding under the other.

The independent operation of the two rules is supported by the fact that Rule 56 and Rule 11 have two distinct analyses with completely different standards of review. The 1983 Amendment to Rule 11 significantly altered the standard upon which to evaluate a Rule 11 motion. Nevertheless, it is widely accepted that the conduct of the non-moving party is to be judged "by an objective standard of reasonableness under the circumstances." *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir. 1987). The court considering sanctions next weighs the evidence to determine whether the non-moving party's pleadings, motions or papers were either well-grounded in fact or warranted by existing law. *Westmoreland v. Columbia Broadcasting System, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1988). For each paper filed, the analysis concentrates on the circumstances existing at the time the individual paper was filed. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3rd Cir. 1987).

In contrast, a court considering a motion for summary judgment under Rule 56 must examine the evidence in the light *most favable* to the nonmoving party. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (emphasis added). The court is not permitted to weigh the evidence to "determine the truth of the matter but to determine whether there is a genuine issue for trial."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In applying this standard while considering the interests of the non-moving party, "[m]uch liberality is allowed in cases where there is a *possible* question of fact involved in summary judgment dispositions." *Kern v. Tri-State Insurance Co.*, 386 F.2d 754, 756 (8th Cir. 1968) (emphasis added). In fact, a court "must give the benefit of the doubt to the party who asserts he can prove a dubious proposition at trial." *Kim v. Coppin State College*, 662 F.2d 1055, 1059 (4th Cir. 1981). Rule 56 analysis is much more subjective than is Rule 11 analysis.

The standards for review of a Rule 11 motion and a Rule 56 motion therefore are not identical. In fact, they are not even similar. Rule 11 is nothing less than a strict objective test which applies a standard of reasonableness. Rule 56, however, utilizes a test which subjectively seeks to give the benefit of the doubt to the challenged party. Considering evidence in "the light most favorable to the non-moving party" under Rule 56 simply does not satisfy the tougher "objective standard of reasonableness" under Rule 11.

It is immaterial whether, as Petitioners argue, the Sixth Circuit was correct in citing *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2nd Cir. 1986), as support for the proposition that a ruling on a Rule 56 motion need not determine the outcome of a Rule 11 motion. The accepted standards plainly show that a ruling under one rule need not – and cannot – determine a ruling on the other. The Sixth Circuit neither recognized nor implied an interrelationship between these two rules.

Rather, Petitioners seek to manufacture such a relationship in order to twist it to their own ends.

B. Petitioners did not merely bring a suit "not strong enough to win," but a meritless suit.

Rule 11 was not designed to dissuade attorneys from pursuing lawsuits with both merit and a challenging factual or legal setting. Far from it. Countless decisions quote the Advisory Committee Notes to the Amended Rule 11 stating that "[t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *See, e.g., Gaiardo,* 835 F.2d at 483. The language of Rule 11, however, clearly shows that the rule seeks to prevent *meritless* lawsuits.

Petitioners seek to prove that their suit was not meritless on the grounds that it survived the motion for summary judgment. Petitioners further seek to have their case serve as the bright line test regarding meritless and properly brought suits, i.e., any suit which survives a motion for summary judgment, Petitioners assert, is clearly a suit with merit. That simply cannot be so, as the preceding discussion of the standards for Rules 11 and 56 points out. In fact, not merely is Petitioners' proposition untrue, but their own case unequivocally proves it to be untrue. As the Counterstatement of the Facts points out, Petitioners filed suit against G & G *in spite of* facts in their possession at the time they filed the Amended Complaint which showed that G & G could not be liable for Harold Mann's injuries.

First, after filing the initial Complaint against Hutchinson, Petitioners discovered that although G & G

supplied all the shafts for Hutchinson augers, the shaft in the Mann auger was neither manufactured nor supplied by G & G. Both the district court and the Sixth Circuit correctly found, and the Sixth Circuit specifically stated, that "[a] reasonable inquiry would have revealed that the first theory in plaintiffs' Amended Complaint was not well-grounded in fact." *Mann*, 900 F.2d at 959.

Second, Hutchinson deposed Mr. Mann almost three months before Petitioners filed their Amended Complaint. Even if Petitioners had not interviewed their client to learn of his background, which failure in and of itself may have violated the Rule 11 requirement of prefiling inquiry, this deposition should have informed Petitioners that Mr. Mann was an experienced farmer who knew full well why farm machinery was guarded, that loose clothing should be kept away from moving parts, that an entire PTO shaft was supposed to be guarded, that his own particular shaft was missing over half the guard, and that, as a result, his auger was less safe than one properly guarded. In conclusion, Mr. Mann admitted that his accident might not have occurred if the proper guard, i.e., a complete guard, had covered the PTO shaft. (App. 21) Had Petitioners inquired, this fatal flaw in their case would have been discovered before the suit was filed.

Finally, even before filing the original Complaint against Hutchinson, the local police chief *as well as Petitioners* noticed a sharp projection on the uncovered end of the shaft. (App. 1-2, 6-8) The police chief stated at that time and in a later affidavit that Harold Mann's clothing was unwrapped from around the shaft at a point below the end of the partial guard remnant – revealing the sharp projection which apparently snagged Harold

Mann's clothing. (App. 9) In other words, it is immaterial whether G & G manufactured the partial guard remnant since the uncovered PTO shaft was the point of contact.

In spite of these facts, Petitioners nevertheless amended their Complaint, asserting G & G was liable for Mr. Mann's injuries. (A 49-53) Later discovery merely reinforced these facts, already known to Petitioners. Yet, Petitioners still persisted in their meritless claim. The district court properly applied the Rule 11 standards in finding that sanctions were appropriate. In turn, the Sixth Circuit applied the correct abuse of discretion standard in affirming the district court's sanctions. These sanctions were both correctly imposed and correctly affirmed. To even entertain Petitioners' proposition that surviving a Rule 56 motion immunizes parties from Rule 11 sanctions when this very case points out the untenability of that proposition would be ill-advised.

C. The sanctions imposed in this case were appropriate.

The results of the district court's Rule 11 analysis plainly indicate that sanctions were appropriate. Furthermore, the sanctions imposed were appropriate. However, Petitioners would have this Court believe that G & G inappropriately sought sanctions because G & G had the stronger case and because G & G had spent a great deal of time and money defending a weak claim. Petitioners contend that the Sixth Circuit's ruling resulted in exactly the situation *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790 (6th Cir. 1988), sought to prevent. However, *Mihalik* and this case are not at all alike, as the Sixth Circuit, author of both

decisions, recognized. In reality, and as Petitioners are aware due to two letters addressed to Attorney Farrer from Attorney Verwys (App. 93, 97), G & G sought Rule 11 sanctions because Petitioners knew that G & G was not liable or would have known that G & G was not liable had they undertaken even a cursory prefiling inquiry. Moreover, as Petitioners are also aware, sanctions were not sought as reimbursement for the expense of defending a weak claim. Instead, G & G sought reimbursement for expenses incurred because Petitioners employed costly and often unnecessary discovery tactics and because Petitioners were undeterred by the threat of sanctions, as detailed in the Counterstatement of Facts.

Petitioners would also have this Court believe that this is a fee-swapping case. Petitioners contend that the courts below adopted a rule forcing a losing plaintiff to bear the entire cost of litigation for the defendant in cases where the plaintiff did not successfully proceed with the claim. Again, Petitioners misstate the earlier rulings in this dispute. In fact, the Sixth Circuit remanded the case for a review of the sanctions imposed.

It is widely recognized that Rule 11 sanctions were not designed to be a general fee shifting device. *Gaiardo*, 835 F.2d at 483. To meet Rule 11's goal of deterrence, awarding "reasonable expenses" does not necessarily mean awarding actual expenses. *INVST Financial Group*, 815 F.2d at 404. The Sixth Circuit has previously stated that a court should "impose the least severe sanction that is likely to deter." *Jackson v. Law Firm of O'Hara, Riberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). The Sixth Circuit kept this in mind when it found that sanctions were appropriate. The "least severe sanction" was

also a factor when the Sixth Circuit remanded the case, although it mistakenly did so.

Counsel for G & G informed Petitioners throughout the litigation process of their expenses to date and their intentions to seek Rule 11 sanctions. Petitioners were not deterred from pursuing their case. Moreover, on two occasions, counsel for G & G offered to settle if Petitioners would pay only half of respondents' costs and expenses. (App. 93, 97) Petitioners still were not deterred and refused to settle. Clearly, nothing short of reimbursement of G & G's entire fees and expenses will deter Petitioners from pursuing meritless claims like this because nothing *did* deter them from pursuing their claim up until their voluntary dismissal.

An award of less than the entire amount of G & G's legal bill will *encourage* improper tactics such as those practiced by Petitioners because it will signal that offending attorneys will not be held responsible for their knowing violations of Rule 11. As a result, G & G's full litigation costs are the proper sanctions.

D. The Sixth Circuit ruling does not place zealous advocates at risk for Rule 11 sanctions.

As Petitioners self-righteously argue that they do not deserve sanctions for representing their clients zealously, as required by Canon 7 of the ABA Model Code of Professional Responsibility, they gloss over the fact that they voluntarily dismissed the case only weeks before trial. In the final analysis, they refused to zealously represent their clients and present to the jury a case which they

hotly maintained throughout this entire suit was a "jury trialable [sic] issue."

While Canon 7 states that "a lawyer should represent a client zealously within the bounds of law," Disciplinary Rules[4] interpreting Canon 7 indicate that an attorney may not knowingly advance an unwarranted claim and may decide not to assert a client's position in the exercise of professional judgment. DR 7-102(A)(2), DR 7-101(B)(1).[5] (App. 102)

Petitioners knowingly asserted and maintained an unwarranted claim which, at any time throughout the proceedings, they could have withdrawn without violating their professional obligation of zealous advocacy. The

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[4] The Model Code consists of Canons, Ethical Considerations, and Disciplinary Rules. The Canons state the general axiomatic norms of the legal profession. Using general terms, the Canons state the standards of conduct expected of lawyers as they interact with the public, the legal system, and the legal profession itself. The Ethical Considerations and Disciplinary Rules are derived from the general concepts embodied in the Canons. Unlike the Ethical Considerations, the Disciplinary Rules are mandatory. "The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA Model Code of Professional Responsibility Preliminary Statement (1981).

[5] Rule 11 codifies the relationship between a lawyer's duties to the client and to the justice system. "Notwithstanding a counsel's duty vigorously to represent his client, his preeminent duty is to the fair administration of justice." Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Liability*, 61 N.Y.U. L. Rev. 300, 316 (1986).

Code of Professional Responsibility therefore does not provide any defense to Petitioners.[6]

II. RULE 11 SANCTIONS WERE IMPOSED PROPERLY UPON LAWYERS WHO SIGNED PLEADINGS, MOTIONS AND OTHER PAPERS IN FURTHERANCE OF A MERITLESS LAWSUIT

The Sixth Circuit ruled that sanctions were appropriate "[b]ecause a reasonable inquiry would have disclosed that [Petitioners'] Amended Complaint was not well-grounded in fact." *Mann*, 900 F.2d at 960. The Sixth Circuit did not say that a particular theory was not well-grounded in fact, but that the entire Amended Complaint as to G & G was not well-grounded in fact. In essence, the Sixth Circuit held that Petitioners brought a meritless suit against G & G.[7]

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[6] Petitioners assert *State Bar v. Corace*, 390 Mich. 419, 213 N.W.2d 124 (1973), as judicial support for their actions. But while *Corace* states that a lawyer may "assert the view of the law most favorable to his client's position," 390 Mich. at 434, this case from the very start has revolved around facts not law. Petitioners also quote *Corace* for the proposition that a lawyer could not properly be disciplined unless the lawyer advanced an unwarranted claim or defense. Not only does this fail to advance Petitioners' argument, but it justifies the sanctions imposed against them. The facts available to Petitioners when they filed plaintiffs' Amended Complaint show, and the Sixth Circuit rightly found, that Petitioners advanced an unwarranted claim.

[7] Although *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684 (S.D.N.Y. 1986), *aff'd*, 854 F.2d 1452 (2nd Cir. 1988),

(Continued on following page)

Rule 11 was created out of a concern for the proliferation of meritless suits. The Rule's duty of reasonable inquiry applies to *every* pleading, motion or paper. Extending beyond the initial filing, Rule 11 imposes "a continuing obligation on attorneys to refrain from pursuing meritless or frivolous claims *at any stage of the proceedings.*" *Advo Systems, Inc. v. Walters*, 110 F.R.D. 426, 430 (E.D. Mich. 1986) (emphasis added). This requires an attorney to continually analyze and reevaluate the asserted claim or defense as the case progresses. In fact, an attorney "*must* abandon claims or defenses as soon as it becomes apparent that it is unreasonable to pursue them." *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 208 (E.D. Ky. 1987), (emphasis added).

Maintaining a meritless or frivolous suit violates Rule 11. Thus, a paper that in and of itself might not offend Rule 11 can be offensive to the Rule's stated purpose if it aids in maintaining a meritless suit. The Sixth Circuit found that Petitioners' Amended Complaint was not well-grounded in fact and so violated Rule 11. Every paper signed thereafter was based upon the Amended

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(Continued from previous page)

was reversed on other grounds by *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), it was still correct in saying:

> The purpose of the 1983 amendments to Rule 11 was to increase the effectiveness of Rule 11 in deterring abuses by expanding the equitable doctrine permitting the court tc award expenses to a litigant whose opponent sets forth frivolous claims and defenses. *See* Federal Civ. Pro. R. 11 Advisory Committee Note.

650 F. Supp. 684 at 687.

Complaint and furthered a suit that should never have been brought. As a result, every paper was an offending paper and all who signed such a paper were properly sanctioned.[8]

CONCLUSION

The Sixth Circuit did not establish new law but merely followed existing standards when it affirmed the imposition of Rule 11 sanctions on Petitioners. Even though Petitioners survived a motion for summary judgment, the sanctions imposed were appropriate because Petitioners brought a meritless suit against G & G which was not well-grounded in fact. Furthermore, sanctions were appropriately imposed upon all lawyers who signed papers violating Rule 11. Contrary to Petitioners' assertions, the ruling below does not place zealous advocates at risk for Rule 11 sanctions.

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[8] To the extent that some of the Petitioners seek to absolve themselves from liability at the expense of the signer of the Amended Complaint, it would appear that Petitioners' counsel may suffer from a conflict of interest. This apparent conflict is brought to the Court's attention in compliance with Michigan's interpretation of the Code of Professional Responsibility. *See Roberts v. Gateway Motel of Grand Rapids, Inc.*, 145 Mich. App. 641, 678-79, 378 N.W.2d 558 (1985), *leave to appeal denied*, 424 Mich. 889, 377 N.W.2d 895 (1986).

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 11, 1990

STATEMENT OF

DENNY MANN

IN THE CASE OF HAROLD MANN

STATEMENT OF DENNY MANN, taken before me at 65057 Shaffer Road, Constantine, Michigan, on May 12, 1983, at 6:36 o'clock P.M.

PRESENT: JAMES T. SLOAN, JR., Attorney
FREDERICK J. FARRER, Attorney
JIM DUNSMOOR, Investigator
CHERYL A. VAGUE, CSR-2250

* * *

Q. And when you looked at it over there at the auction, describe for us whether not there was a complete plastic guard on the power take-off attached to the auger. Was incomplete?

A. Incomplete.

Q. Tell how it is incomplete, because I don't know anything about it.

A. Well, the complete power take-off was there. You have a piece that slides in, in another one which you saw. And half that goes to the tractor. The plastic guard wasn't there.

* * *

Q. And today we noticed, and I don't know if you noticed, a rough portion of the metal that looked like had been banged and was I'd say capable of maybe catching clothes. Have you ever seen that before?

A. No, never paid any attention to it.

Q. Mr. Dunsmoor saw it today. Did you see it today while looking at it, at the power take-off?

A. Yeah.

STATEMENT OF
RAYMOND STUTZMAN

IN THE CASE OF HAROLD MANN

STATEMENT OF RAYMOND STUTZMAN, taken before me at the Spade Fuel Company, Florence, Constantine, Michigan, on June 7, 1983, at 1:15 o'clock P.M.

PRESENT: JIM DUNSMOOR, Investigator
RAYMOND STUTZMAN, Witness
CHERYL A. VAGUE, CSR-2250

EXAMINATION

BY MR. DUNSMOOR:

Q. I want you to tell me what you know about the accident.

A. I had bought the auger two years before I had the auction. And I bought it in the same condition that I sold it in, exact same condition. In fact, I, I, uh, never had the guard on the power take-off. And I was always careful. I was going to get some, but I just never did. So, I bought it from Hoc stetler Grain out of Nappanee.

* * *

Q. And did you purchase it new?

A. No, it was a used outfit when I bought it.

Q. What kind of shape was it in when you bought it?

A. Exact same shape as I sold it.

Q. Everything worked on it?

A. Yes, definitely.

* * *

Q. Did you have plastic guard?

A. Yes, it was like that.

* * *

Q. Now, does this plastic guard turn with the drive shaft do you remember, or does it sit stationary?

A. They definitely will drive. They, they definitely turn. The drive shaft, they will. But, they're not – If you get against this, supposed to stop.

Q. Is that right?

A. So, I mean, there's no, just no doubt about it there wasn't the right kind of shield on that thing. I mean, as far as the drive, this thing here, part itself.

Q. The lower half of the shaft?

A. Yeah. In fact, this, that would have had the shaft. I'm not saying it wouldn't have happened, but it would have maybe prevented it. And, but I used it like that. But, I did, I can remember on the day of sale saying, "I do not have the guard, and it should be put on."

Q. Who said that to you?

A. I said that when I sold the auger.

Q. When you sold to Harold Mann?

A. I said. They walked up to the auger. They asked me, the auctioneers asked me about the power take-off

shaft. I said, "I do not have the shield on the lower end, but it definitely should have one."

Q. They make one for it?

A. Oh yeah, you can get them.

* * *

Q. Did you ever say anything about to Hochstetler when you didn't get a lower guard when you bought it?

A. No, I didn't. I bought it the way I seen it. That's the way I bought.

Q. Just the one guard on it?

A. Yeah.

Q. No lower guard. But, you say it is available. They do make them.

A. Yes.

STATEMENT OF

ROBERT BREWER

IN THE CASE OF HAROLD MANN

STATEMENT OF ROBERT BREWER, taken before me at the Constantine Police Department, Constantine, Michigan, on June 7, 1983, at 11:22 o'clock A.M.

PRESENT: JIM DUNSMOOR, Investigator
ROBERT BREWER, Witness
CHERYL A. VAGUE, CSR-2250

EXAMINATION

BY MR. DUNSMOOR:

Q. I want to talk to you about this accident involving Harold Mann. And this occurred on November 9th, 1982. And you say you were called out to the scene to take pictures?

A. Just take pictures.

Q. What can you tell me happened at that time? What do you remember about the accident?

A. Well, the only thing I remember is when I got out there, um, Frank McDaniels with the rescue squad was, that he was the one that called me. He said that because of the accident he would like me to take pictures. And this is the way the scene looked when I got there.

Q. You're looking at a picture of tractor there.

A. Tractor with the clothing still wrapped around the power take-off.

* * *

Q. And this just shows the tractor, the rear end of tractor with the power take-off going to the auger.

A. Right.

Q. And you say there's clothing wrapped around that?

A. Yes.

Q. That shaft. Now, I don't know if you can tell, but in this picture is this part of the plastic guard that is underneath the clothing?

A. I believe it is, yeah.

Q. Did you find any other pieces of that guard? Do you know if that was a two-piece device sliding into one another?

A. No, I didn't see any other pieces. Okay. After, after I observed this and took the pictures, I asked Frank, and I forget who was with him, to go ahead and start removing the clothing from the shaft. And they went ahead and started unwinding.

Q. Clothes wrapped pretty tight?

A. The clothes were wrapped tight. Okay. After the shaft was clear, refer to this picture here.

Q. All right.

A. That's just, that's the way that the shaft was. I observed fibers on this square piece next to the guard.

And threads, I guess you would call it threads or materials caught on the little sharp, little sharp snag or something. You could tell it was rough.

Q. This you're referring to, the sharp snag, is on the smaller of the square drive shafts?

A. It would be the actual power take-off. And this would be the guard.

Q. They have a sliding shaft here, a square drive shaft. One is smaller than the other.

A. Yes.

Q. The one with the snag you're talking about is smaller drive shaft.

A. Yes.

* * *

Q. I am looking at another picture here that shows just a closeup of this drive shaft, this square drive shaft. And I guess from looking at the picture here this shows the smaller section of drive shaft and a lot of thread around right in the middle of picture wrapped around that drive shaft. You said there was some sort of snag in it?

A. I believe right in the area of picture there was a rough spot. At the time I didn't think it was that rough. I mean, I didn't feel it would be enough to catch some clothing to wrap a guy's leg around it.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiff,

vs.

HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation, and G & G MANUFACTURING, INC., a Nebraska corporation,

Defendants.

Case No.: K84-71-CA4

AFFIDAVIT OF ROBERT E. BREWER

/

James Thomas Sloan, Jr. (P-20583)
Attorney for Plaintiffs

Robert C. Mabbitt, Jr. (P-24844)
Attorney for Defendant

Paul L. Nelson (P-33605)
Attorney for G & G Mfg.

/

STATE OF MICHIGAN)
)ss.
COUNTY OF ST. JOSEPH)

ROBERT E. BREWER, being first duly sworn, deposes and says of his own personal knowledge that he is competent to testify in this matter and if called he would testify as follows:

1. I am the Chief of Police of the Village of Constantine, Michigan and have held that position since 1970.

2. On November 9, 1982 at 9:40 a.m., I was called to the scene of an accident at 65057 Shaffer Road, in Constantine. This was the residence of Harold Mann.

3. The accident apparently occurred when Mr. Mann's clothing became entangled in a PTO shaft attached to a grain auger which he was operating.

4. At the time I arrived on the scene, Mr. Mann already had been taken to the hospital by the emergency unit.

5. Upon my arrival, I took two rolls of photographs of the accident scene, including seventeen pictures of the grain auger and the surrounding area. Copies of these photographs are attached hereto as Exhibits 1 through 17.

6. Shortly after leaving the scene, I prepared a report of the incident for the Police Department files. A copy of the report is attached hereto as Exhibit 18.

7. As Exhibit 18 indicates, I took photographs of the scene before, during and after Mr. Mann's clothing remnants were removed from the PTO shaft.

8. When the clothing was removed, I observed a few strands of thread from the clothing caught in a rough spot on the square edge of the PTO shaft. This is depicted on Exhibits 13, 14 & 16 where I have circled and initialled the location.

9. The rough spot referred to in my report was a sharp projection on the bare, unguarded portion of the PTO shaft at the time I looked at it. I recall noticing that the projection was sharp enough to cut a finger if it was rubbed.

10. At the time I saw the projection, I felt that this projection was the location where Mr. Mann's clothing first began to be entangled on the PTO shaft.

11. At the present time, that still is my belief. I have no reason to change my mind.

FURTHER AFFIANT SAITH NOT.

/s/ Robert E. Brewer
Robert E. Brewer
Chief of Police
Constantine, Michigan

Subscribed and sworn to before me, a Notary Public, this 20th day of January, 1987.

/s/ Diane K. Reese

Notary Public, St. Joseph Co., MI
My Commission Expires: May 23, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN
and JEAN MANN,

Plaintiffs,

vs. Case No. K84-71 CA4

HUTCHINSON DIVISION,
LEAR SIEGLER, INC.,
a Delaware Corporation,

Defendant.

DEPOSITION

The deposition of DWIGHT BENNINGA, taken on behalf of the Plaintiff, pursuant to the Federal Code of Civil Procedure and Notice before:

Sandra K. Cowan, C.S.R.
OWENS, BRAKE & ASSOCIATES
413 Poyntz Avenue
Manhattan, Kansas

a Certified Shorthand Reporter of Kansas, at 514 West Crawford, Clay Center, Kansas, on the 8th day of April, 1985, starting at the hour of 10:00 a.m.

APPEARANCES

The plaintiffs appeared by their counsel, Mr. James Thomas Sloan, Jr., Attorney at Law, 501 Comerica Building, 151 South Rose Street, Kalamazoo, Michigan 49007-4780.

The defendant appeared by its counsel, Mr. R. Curtis Mabbitt, of Dykema, Gossett, Spencer, Goodnow & Trigg,

Attorneys at Law, 200 Oldtown Riverfront Building, 248 Louis Street, N.W., Grand Rapids, Michigan 49503.

* * *

Q. It's my understanding that this company does not produce this shield or guard but orders it from someone else; is that correct?

A. Yes.

* * *

Q. Where is the company located from whom you purchase those shields or guards?

A. The vendor that we have used is located in Omaha, Nebraska.

Q. That vendor's name?

A. G & G Manufacturing Company.

* * *

Q. We got absorbed in the question of whether or not this machine of which we have pictures involved a power takeoff shaft that was produced by you folks and you said you had some pictures. Would you go through there and show me the picture you're discussing?

A. All of these show all or a portion of what I'll refer to as a PTO shaft, which upon some of the photographs is connected between the tractor and a gearbox on the auger.

Q. All right. Go ahead.

A. Now, those show a PTO shaft unit that was not produced or supplied by Hutchinson.

Q. How are you able to determine that from the pictures I hold in my hand? We'll get to a particular picture in a minute, but how are you able to determine that?

A. There are several reasons. The means that the two sections of the shaft connect together is different from what Hutchinson uses. The construction of the universal joints themselves is different as can be seen in the photographs. The connection to the gearbox is different.

* * *

Q. I see. Now, you told me then by looking at this picture that you can state for the record here that the PTO shaft was not made by G & G?

A. I don't know who made the PTO shaft.

Q. So it could have been made by G & G, as I understand it?

A. I don't know.

Q. What references – now to the shield we're talking about, can you tell me whether or not that was made by G & G?

A. No.

Q. There seems to be there some doubt in your mind as to whether or not this was, in fact, a component part of the machine as originally shipped or at least

fabricated by you in April of 1980. On what do you base this feeling?

A. I wouldn't say there's any doubt in my mind at all. It was not a component part that Hutchinson provided.

Q. And again, on what do you base that statement?

A. As I indicated earlier, there were three things that I base that on, and there may be others, but those are three that come to mind.

Q. Those three being what again?

A. The arrangement of the two parts of the PTO shaft unit as are visible on another photograph when it's shown –

MR. MABBITT: Number 13. Looks like this.

Q. Now we have Number 13 of my set. Explain that for me then, if you will. What do you find in there different from what you would expect to find produced by this company?

MR. MABBITT: Produced by G & G, you mean?

MR. SLOAN: Produced by our own company right here.

MR. MABBITT: Supplied by it?

MR. SLOAN: Yes.

A. The PTO shaft that Hutchinson supplied was produced in such a way that the two parts would not separate, they would telescope and the overall length of the PTO shaft unit could be varied, but the two would not separate or come apart as is shown in this photograph.

Q. All right. Is there anything else that we can look at then that would indicate that this was not, in fact, a piece of equipment that you folks provided?

MR. MABBITT: Number 10.

Q. Now we're looking at Number 10 of my set of pictures here. What is there different?

A. The construction of the universal joint, which is what this flexible portion is generally referred to, is just not similar to the kind that Hutchinson supplies. This appears to be some sort of forging or casting construction. The Hutchinson-supplied units are a malleable iron stamping kind of construction, I guess that's the best way I can describe it, and visually the two just look different.

Q. I see. So now we have a third differential, as I understand it, or rather a second differential. One, we have a PTO shaft that separates and you claim that the ones you supplied did not separate, and then there's a difference on the coupling that we see in Number 10; is that correct?

A. The universal joint, yes.

Q. Any other difference then?

A. In Photograph 14.

Q. Okay, we're looking at Number 14.

A. The connection to the gearbox on units that Hutchinson supplies includes a hole through the end portion of the universal joint so that a pin can be placed through that joint and also through the shaft of the gearbox inside. This connection does not have such a hole.

Q. Could you – can I determine that from this picture?

A. Yes, that photograph essentially shows a hundred and eighty degrees of the unit. A hole through – extending out of both sides, one end of it would be visible in this photograph if it existed.

Q. That then is the third distinction. Any others?

MR. MABBITT: On the PTO shaft, correct?

MR. SLOAN: Thank you, I appreciate that.

A. Not that come to mind.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN
and JEAN MANN,

Plaintiffs,

vs. Case No. K84-71 CA4

HUTCHINSON DIVISION,
LEAR SIEGLER, INC.,
a Delaware Corporation,

Defendant.

DEPOSITION

The deposition of MARK OLIPHANT, taken on behalf of the Plaintiff, pursuant to the Federal Code of Civil Procedure and Notice before:

Sandra K. Cowan, C.S.R.
OWENS, BRAKE & ASSOCIATES
413 Poyntz Avenue
Manhattan, Kansas

a Certified Shorthand Reporter of Kansas, at 514 West Crawford, Clay Center, Kansas, on the 8th day of April, 1985, starting at the hour of 1:15 p.m.

APPEARANCES

The plaintiffs appeared by their counsel, Mr. James Thomas Sloan, Jr., Attorney at Law, 501 Comerica Building, 151 South Rose Street, Kalamazoo, Michigan 49007-4780.

The defendant appeared by its counsel, Mr. R. Curtis Mabbitt, of Dykema, Gossett, Spencer, Goodnow & Trigg,

Attorneys at Law, 200 Oldtown Riverfront Building, 248 Louis Street, N.W., Grand Rapids, Michigan 49503.

* * *

Q. You've had a chance to look over these photographs, I assume. Are you able to tell whether or not any of the power takeoff apparatus is or was sold by your company?

A. You're asking if the power takeoff shown in this picture in my opinion was sold and furnished by our company?

Q. Yes. If you know, fine, if you don't know, fine, it makes no difference.

A. This power takeoff shaft does not appear to be one we furnished with – from our company.

Q. Do you know that of your own knowledge then, or is this something that the company has researched and you have now decided that; what is the situation?

MR. MABBITT: Do you understand that question? What he's basically asking you is do you know that from your own observations from the photo or do you now that because somebody in the company has told you that. Is that fair?

MR. SLOAN: That's fair.

A. My observation of the photo tells me that this was not the power takeoff shaft furnished with this auger.

* * *

Q. I think I'm asking, sir, of your own personal knowledge, can you sit there and tell me that this is not the power takeoff that you folks would have shipped with your machine, and if so, on what do you base that?

A. I base my observation on – the power takeoff shaft that we furnish has a pin hole in the gearbox end of the –

Q. That was so in 1982. Can you tell me if that was so in 1980?

A. To the best of my knowledge, yes.

* * *

Q. Can you identify that as being a power takeoff shaft in this picture sold by your company, or are you unable to do so?

A. I cannot identify that.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,	)	
Plaintiffs,	)	File No.:
-vs-	)	K84-71 CA4
HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation,	)	
Defendant.	)	

Deposition of HAROLD MANN, taken under the provisions of the Michigan General Court Rules before Kathy J. Anderson, (CSR-2573), Certified Shorthand Reporter and Notary Public, at 501 Comerica Building, 151 South Rose Street, Kalamazoo, Michigan, on Thursday, March 28, 1985, commencing at 1:00 p.m., pursuant to Notice.

APPEARANCES

ON BEHALF OF THE PLAINTIFFS:

Mr. Fredrick J. Farrer
Sloan, Benefiel, Farrer, Newton & Glista
501 Comerica Building, 151 South Rose Street
Kalamazoo, Michigan 49007

ON BEHALF OF THE DEFENDANT:

Mr. R. Curtis Mabbitt
Dykema, Gossett, Spencer, Goodnow & Trigg
200 Oldtown Riverfront Building
248 Louis Street, N.W.
Grand Rapids, Michigan 49503

* * *

Q Tell me what type of mechanical equipment you had used in your years of farming.

A Anything connected with it, everything.

Q Well, okay. You tell me everything but that doesn't tell me a whole lot.

A Anything connected with general farming.

Q Well, I want to know what type of equipment that is. Does that include a tractor?

A Yes.

Q All right. What other types of equipment had you used?

A Well, like I say, it would take me an hour to describe everything.

Q Well, give me a representative list.

A Well, tractor, plows, cultivators, drag disks, corn planters, drain drills, augers, elevators, field choppers, silo filling equipment, hay balers, combines.

Q That is good. You used a lot of different equipment?

A Anything connected with general farming, right.

* * *

Q Did this machinery that you had used in your farming have guards over its moving parts?

A If they had a power take-off, it did. And some of the others had shields too. Just flat shields, yes.

Q Okay. In your experience, where has it been that – and by the word where, I mean where on the machine had you seen either guards or shields?

A Moving parts.

Q Okay. Were you used to seeing guards or shields over moving parts?

A Yes.

Q On the equipment. And what was your understanding of what those guards or shields were for?

A Protect you from getting caught.

Q Had some of this equipment also had warnings, decals on various parts of the equipment?

A Yes.

Q What types of warnings were you used to seeing on equipment?

A Well, just keep the guards in place.

Q Any other types of warnings you remember seeing on equipment?

A No. Stay away from it, keep them in place and stay away from it is all I can remember.

Q You ever recall seeing a warning that said keep loose clothing out of moving parts?

A Yes.

Q Okay. Is that something that you were aware of as being something that was good safe practice, to keep loose clothing away from moving parts?

A Yes.

Q Okay. Is that something that you needed to be told or you needed to read in a warning or did you already know it?

A Oh, I knew that, yes.

Q Okay. What was your understanding of why you should keep loose clothing away from moving parts?

A Well, so it wouldn't get caught.

Q And why didn't you want it to get caught?

A Because you would get wrapped up like I did.

Q Okay. What was your understanding of why you – there would be warnings to make sure guards and shields were in place, same thing?

A To keep you away from it, chains.

Q So that you wouldn't get caught in those moving parts?

A Right. Usually had a guard over a chain and a guard over a shaft.

Q Okay. Again, would it be fair for me to say that that is something that you knew and were aware of and really didn't have to be told?

A Yes.

* * *

Q Okay. Was there a guard on this power take-off shaft?

A Yes.

Q Was there a guard over the entire portion?

A No. The front two-thirds, probably.

Q When you mean front, do you mean the part that connects up on the tractor?

A Yeah. I could be wrong one way or the other. I think it was on the front. I am sure it was on the front.

Q Okay. Again, front means the part that hooks up onto the tractor?

A That's correct.

Q That is the part that had the guard on it?

A I am thinking that. I could be wrong but I am sure that is right.

* * *

Q Mr. Mann, I have had a photograph marked as Defendant's Deposition Exhibit A and I will show it to you, ask you to look at it. Does that refresh your memory as to which portion of the PTO shaft had the guard on it and which portion didn't have it on it?

A Yes.

Q Okay. And it turns out you were opposite in your memory, right?

A Right.

Q So which portion of the PTO shaft had the guard on it?

A The rear part.

Q Part towards the auger?

A Correct.

Q Okay. And the part towards the tractor was the part that did not?

A That's correct.

Q Okay. Now, I understand that this missing part of this guard is something that you were aware of prior to your accident?

A Yes.

Q You knew it was missing?

A Yes.

Q Could you look and tell that this auger had originally been made with a guard over the entire shaft?

A No. I know they have a guard, but you couldn't tell by looking at it.

Q You couldn't?

A No. It was plastic and it was gone.

Q You know now that it was originally made with a guard?

A No, no.

Q All over it?

A No, I don't know that. But I assume that all power take-offs do have.

Q Well, did you assume that with this particular auger?

A Well, I would assume that all power take-offs have a guard.

Q And did you assume that same thing with this auger?

A I would assume so, yes. See, there is a knuckle next to the tractor, as you can see, with no clothing wrapped on it. That guard covers that and this did not have one.

Q So you realized when you were using it that really that the entire shaft was supposed to have a guard over it and for some reason part of this one was missing?

A That's correct.

Q Okay. And did you realize when you were using the auger that the guards were put there for your protection?

A Yes.

Q And for your safety?

A Yes.

Q Did you realize that this auger was less safe because part of the guard was missing from the shaft?

A Yes.

Q Did you realize that your clothing could get caught on that exposed portion of the shaft?

A Yes.

* * *

Q Before you purchased the auger, the day of the auction, I imagine you did that by bidding or something, am I right?

A Yes.

Q Okay. Before you decided to start bidding on this auger, I would assume that you checked it over, inspected it to make sure it was something you wanted to buy?

A Um-hum.

Q Am I right?

A Yes.

Q Did you see at the time you checked it over that a portion of the guard was missing off of the PTO shaft?

A Yes. This looked brand new, this auger. I thought it was. I find out later that it had tipped over and had been taken to the factory or to a dealer representative and been all rebuilt. This has been told to me since by my attorney, I guess, or somebody. Fellow by the name of Hochstetler in Nappanee, Indiana. But the auger looked brand new at the time of purchase.

Q Except that you could tell even when you looked at it that for some reason a portion of the guard was missing from the PTO shaft?

A That's right.

Q Which you expected should have been there?

A Right. Right.

* * *

Q At the time you bought the auger did anyone tell you why that missing guard had not been fixed?

A No.

Q When you bought the auger and took possession of it, did you make any effort to get that guard fixed so that there was a guard all the way across the PTO shaft?

A No.

* * *

Q All right. You agree with me, don't you, that if you had had a guard placed all the way across the PTO shaft that there then would have been more protection across that shaft?

A It would be more protection, I would assume.

Q And there would have been more safety?

A Yes, I would say so.

Q For you. Okay. And if you had had a guard put on there so it covered the whole shaft, the accident would have been less likely to happen, the accident you had?

A It would be less likely.

Q And perhaps might not have happened at all?

A Correct.

TOLLEY, FISHER & VERWYS, P.C.
ATTORNEYS AT LAW
5650 FOREMOST DRIVE, S.E.
GRAND RAPIDS, MICHIGAN 49506-7081

PETER R. TOLLEY
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MARK H. VERWYS
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E. DONALD WIERENGA
MICHAEL C. WALTON
TODD R. DICKINSON
SHARON R. BRINKS
PAUL L. NELSON
KELLY A. SHADOWENS

TELEPHONE
(616) 942-8090

November 18, 1985

Mr. Fredrick J. Farrer
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007

Re: Harold and Jean Mann
vs. Hutchinson Division, Lear
Siegler, Inc., et al.
Case No. K84 71 CA4
Our File No. 55-4490

Dear Fred:

I have received and reviewed your Notice of Deposition in the above-referenced matter for my client, G & G Manufacturing Company, Inc.

As I expect you know, it is our position that G & G Manufacturing did not make the PTO shaft involved in your client's accident. I have requested photographs of

that shaft from Curt Mabbitt with the intention of sending them to G & G Manufacturing for review and a determination of whether or not it is a G & G shaft. I have not yet received those photographs.

If your client's accident did not involve a G & G Manufacturing shaft, it would seem pointless to go to Omaha on the 17th of December. I doubt that I will be able to get the photographs from Mr. Mabbitt and have them reviewed before that date. Would you voluntarily agree to put off your deposition until such time as G & G personnel can confirm or deny whether their PTO shaft is involved? The photocopies attached to your Notice of Deposition are not legible enough for such a determination.

Please let me know.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV:bsa

cc R. Curtis Mabbitt, Esq.
bcc Brian Schuh, Claim No. 69P001301
James Hergert

TOLLEY, FISHER & VERWYS, P.C.
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(616) 942-8090

December 11, 1985

Fredrick J. Farrer
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
Kalamazoo, MI

Hand Delivered
December 11, 1985

Re: Mann v. Hutchinson & G & G
Our File No: 55-4490-5
Case No: K84 71 CA4

Dear Mr. Farrer:

I would like you to reconsider your insistence on traveling to Omaha for what I have tried to convince you will be a pointless deposition on December 17, 1985.

G & G first received notice of this claim when they were served with a summons and amended complaint on September 5, 1985 in Omaha, Nebraska. By that time, significant discovery had apparently been conducted. I

learned of the claim on September 16, 1985 and wrote you on September 26, 1985 requesting:

> . . . copies of all pleadings filed to date, deposition transcripts, interrogatories and answers thereto, experts' reports, *photographs* and any other documents pertinent to this file.

I received your responsive letter of October 2, 1985 which included copies of pleadings, but none of the other material I had requested.

Pursuant to your extension, I filed responsive pleadings on behalf of G & G on October 21, 1985. On November 13, 1985, without consulting me, you filed a notice of deposition for unnamed G & G employees in Omaha for December 17, 1985. I received your notice on November 15 and responded by letter on November 18. In that letter, I tried to make that following points:

A. Based on information from Lear, it appeared that this accident did not involve a G & G PTO shaft.

B. The photocopies of photographs attached to your notice of deposition were not legible enough to permit G & G personnel to determine if a G & G PTO shaft was involved.

C. I had requested the photographs you refused to provide from Curt Mabbitt but probably would not review them in time to allow transfer to Omaha and a determination before December 17.

D. A deposition on December 17, 1985, would not be useful until G & G personnel had confirmed the identity of the source of the shalf. I closed my letter by requesting that you voluntarily agree to adjourn the

deposition for a reasonable period of time. You did not respond to my request.

Having been unable to get a set of photographs from Mr. Mabbitt, and not having heard from you, I called you on December 6, 1985. You again refused to supply a set of photographs or adjourn the deposition. I then contacted your photographer, who was able to supply a set of the photographs from his negatives on December 11, 1985.

The set of photographs has been sent to G & G by Federal Express today and should arrive in Omaha on December 12, 1985. It is my hope that G & G will be able to confirm or deny, from the photographs, whether the PTO shaft is a G & G product. If G & G's answer is negative, I will not go to Omaha on the 17th and no one from G & G will appear for the deposition. If G & G's answer is positive, or equivocal, I will make a deponent available on the 17th, if you wish, but I strongly suggest that you agree to an adjournment so as not to waste your own time and money.

If it turns out that G & G did supply the subject shaft, someone will want to examine the shaft itself before testifying about it. I understand that the shaft is in Michigan, which means that G & G will have to send someone here. If and when that occurs, I would be happy to schedule the deposition here in Michigan, at your offices. You will then have a far more meaningful deposition, at much less cost and inconvenience to everyone, than you will get by going to Omaha on the 17th.

I do not like to write letters such as this. The practice of law is far too difficult even when attorneys act reasonably and cooperatively. I would request again that

you re-evaluate your position and agree to a reasonable adjournment of the deposition.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV:clb

cc R. Curtis Mabbitt
bcc Brian Schuh, Claim No. 69P001301
James Hergert

TOLLEY, FISHER & VERWYS, P.C.
ATTORNEYS AT LAW
5650 FOREMOST DRIVE, S.E.
GRAND RAPIDS, MICHIGAN 49506-7081

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TELEPHONE
(616) 942-8090

January 22, 1986

Mr. James Thomas Sloan, Jr.
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007-4780

Re: Harold and Jean Mann
vs. Hutchinson Division, Lear
Siegler, Inc., et al.
Case No. K84 71 CA4
Our File No. 55-4490-5

Dear Mr. Sloan:

I have been reviewing the pleadings and depositions taken in the above-referenced matter. It appears that you added my client, G & G Manufacturing Company, as a party defendant on the basis of interrogatory answers from the Hutchinson Division of Lear Siegler, Inc. to the effect that Hutchinson purchased all of its PTO shafts from G & G. However, Dwight Benninga also testified, on the basis of his review of photographs of the subject PTO

shaft, that the shaft did not appear to be one supplied to or from Hutchinson.

You have now had the benefit of meeting with Jim Hergert of G & G at your client's farm in Constantine, Michigan, on January 21, 1986. At that time, Mr. Hergert explained to you in great detail why the PTO shaft which was presented to him as having been involved in the subject accident was not a G & G product. It is my understanding, however, that you still wish to proceed with the depositions in Omaha on January 29, 1986.

Count II of your client's amended complaint alleges, at Paragraph 5, that:

> The drive shaft of the Hutchinson Portable Auger in question was designed, manufactured, assembled and/or distributed by this Defendant.

The complaint goes on to make numerous allegations about the actions or inactions of G & G in connection with the subject PTO shaft. The complaint was signed by Fredrick J. Farrer of your firm.

Assuming that when Mr. Farrer used the term "drive shaft" in the amended complaint, you now know, or should know, that G & G in fact did not design, manufacture, assemble or distribute that shaft. I would call your attention to Federal Rule of Civil Procedure 11, which provides in pertinent part:

> The signature of an attorney . . . constitutes a certificate by him that he has read the pleading . . . ; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . , and that it is not interposed for any improper purpose,

> such as to harass or cause unnecessary delay or needless increase in the cost of litigation.
>
> * * *
>
> If a pleading . . . is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . , including a reasonable attorney's fee.

Mr. Hergert would, if asked, sign an affidavit stating the same things he told you in Constantine, Michigan, on the 21st of January. It seems to me pointless and unnecessarily expensive to go all the way to Omaha to have Mr. Hergert testify under oath that G & G did not design, manufacture, assemble or distribute the subject shaft. I would, therefore, appreciate it if you would consider canceling the depositions and dismissing G & G as a party defendant.

On the assumption that you will not do so, please be advised that G & G objects to providing a witness to testify as to Paragraph 1. of your general notice of deposition as it is too broad and will be unable to provide a witness with respect to Paragraph 2. of your general deposition notice because it did not make the subject PTO shaft. Wayne Eipperle will be provided in response to Paragraphs 3-6 of your general deposition notice but may be instructed not to testify with regard to any matters which are not related to the design, manufacture, or distribution of any PTO shaft involved in your client's accident. Furthermore, with regard to your request for production of documents, please be advised that once

you have been furnished with documents which further establish that G & G did not design, manufacture or distribute the subject PTO shaft, further production of documents may be restricted.

It is my understanding from our conversation on the 21st that you have agreed to bring the subject PTO shaft with you to Omaha for inspection by any witness to be deposed prior to their deposition. If that is not the case, you should expect not to depose any witness, other than Mr. Hergert, who has not had an opportunity to examine the subject shaft. Finally, with respect to Mr. Hergert's deposition, you have noticed his deposition to commence at 1:00 p.m., Omaha time. Mr. Hergert has informed me that he has obligations which will require his absence from Omaha on the 30th of January. However, he would be willing to have his deposition start at 11:00 a.m. on the 29th. Therefore, if you have any thought that his deposition might extend beyond normal business hours on the 29th, I would suggest that we start at 11:00 a.m. Please let me know what you wish to do.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV:bsa

cc R. Curtis Mabbitt, Esq.
James Hergert

bcc Brian Schuh, Claim No. 69P001301

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,	)	K84-71 CA4
Plaintiffs,	)	
vs.	)	
HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation, and G & G MANUFACTURING, INC., A Nebraska Corporation,	)	
Defendants.	)	Deposition of: James Hergert

DEPOSITION OF JAMES HERGERT, taken before Bonnie Price, Court Reporter and General Notary Public for the State of Nebraska, on the 29th day of January, 1986, at the offices of G & G Manufacturing, 9410 North 44th Street, Omaha, Nebraska, commencing at 1:50 p.m.

APPEARANCES:

James Thomas Sloan, Jr.
Attorney at Law
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007-4780 For the Plaintiff.

Steven Muhich
Attorney at Law
248 Louis Campau
Promenade
Suite 200
Grand Rapids, MI 49503 For the Defendant,
Hutchinson Division.

Mark H. Verwys
Attorney at Law
5650 Foremost Drive, S.E.
Grand Rapids, MI 49503 For the Defendant,
G & G Manufacturing.

* * *

Q. Now, anything else about the auger end here that you want to point out to us now, the composition of it?

MR. VERWYS: What do you mean, he wants to point out? Ask him questions.

MR. SLOAN: I don't know what questions to ask.

MR. VERWYS: Ask him whether or not they made the shaft.

Q. Can you answer the question?

A. Yes.

Q. What's your answer?

A. No.

Q. Why didn't they?

A. There are several reasons. Number one, the tractor end is a Rexnord joint which we have never used on any power takeoff shaft that we have made.

Q. Now, we haven't been talking about the tractor end, have we, up to this point?

A. No, but you asked me if we made the shaft and you asked me why I think we did not make it. Now I'm telling you.

* * *

Q. Then we have your statement that this was not a unit fabricated by G & G. The first reason was the tractor end is a Rexnord joint and the second reason was what?

A. Second reason, referring to Exhibit 4, all shafts that we have furnished to Hutchinson, which you say are the, as far as this shaft, from the early seventies, had a pin hole for connection of the output knuckle to the gearbox, this shaft does not have such a pin hole.

Q. And that would be located on the end of Exhibit 4?

A. That's right, sir.

Q. And where exactly would that pin hole be?

A. It would be through the major diameter.

* * *

Q. My understanding is that it's not the shaft because you think starting in the late, starting in the early seventies, 1972, I think was the date, that you commenced sending to Hutchinson – you shake your head negatively. Let me finish my question – an instrumentality with a pin hole in it; is that correct?

A. No, the statement is not correct.

Q. Tell me again so I understand.

A. I said that was one of several reasons why I believe this shaft is not a product of G & G.

Q. Fine. Then I have asked you for plans and specifications that will support that and the answer was that they are available or not available?

MR. VERWYS: They are, but we are not going to get them out.

MR. SLOAN: Not today, but you will make them available?

MR. VERWYS: Not necessarily.

Q. The next reason.

A. We have two up to this point, one, that Rexnord on the tractor end never was our manufacturer.

The fact that the pin hole is not in existence is further evidence. The fact that two different joint manufacturers are represented in this particular power takeoff shaft indicates that the shaft somewhere was cannibalized, that somebody has taken two sections, put them together and made a functioning unit out of it, indicates to me.

No manufacturer that I am familiar with would combine two joints in this manner.

A fourth reason, as far as our records indicate, we have always painted the Hutchinson shafts, ends of the Hutchinson shafts white. This paint is such that I don't care if the shaft were 30 years old, some remnants of that paint would be evident on the joints. That is not true on this shaft.

* * *

Q. Now, does that complete the list of reasons why Exhibits 4 and 5 were not supplied to Hutchinson?

A. No, I have one more.

Q. Fire away. That's why we came.

A. The U joints or knuckles are welded to the tubular shafts or the solid shafts as the case may be. These welds on the shaft, Exhibits 4 and 5, appear to be not the type of weld that our machines perform.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN, Plaintiffs, vs. HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation, and G & G MANUFACTURING, INC., A Nebraska Corporation, Defendants.	)	K84-71 CA4 Deposition of: Wayne Eipperle

DEPOSITION OF WAYNE EIPPERLE, taken before Bonnie Price, Court Reporter and General Notary Public for the State of Nebraska, on the 29th day of January, 1986, at the offices of G & G Manufacturing, 9410 North 44th Street, Omaha, Nebraska, commencing at 5:05 p.m.

APPEARANCES:

James Thomas Sloan, Jr.
Attorney at Law
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007-4780 — For the Plaintiff.

Steven Muhich
Attorney at Law
248 Louis Campau Promenade
Suite 200
Grand Rapids, MI 49503 — For the Defendant, Hutchinson Division.

Mark H. Verwys
Attorney at Law
5650 Foremost Drive, S.E.

Grand Rapids, MI 49503 For the Defendant, G & G Manufacturing.

* * *

Q. Now, I believe we're down to Exhibits 4 and 5. Are you of sufficient expertise, insofar as the production of the company, to give me your opinion as to whether or not 4 and 5 were, in fact, manufactured and produced by G & G?

A. Yes.

Q. All right. Now, I want to know your version of this and why don't we take them exhibit by exhibit, that's 4 and 5, if you wish, and give me your comments as to why you think that Exhibit 4, for instance, and that would be which end of the shaft, now?

A. Tractor.

MR. VERWYS: Why don't you ask him if he agrees with Mr. Hergert's testimony that he heard an hour and 45 minutes ago.

Q. This implement end of the PTO, right?

MR. SLOAN: I'll do that in a minute.

A. Now, what was it you wanted to know? If we made the power shaft?

Q. Let's look at Exhibit 4 and give me your comments as to why it is that you think that exhibit was not manufactured by G & G Manufacturing company.

MR. VERWYS: Can we shorten it up by including manufactured, designed, produced and marketed?

MR. SLOAN: That's going to longate it, but I'm willing at this hour of the evening.

MR. VERWYS: The reasons are the same and I would assume cover all of those.

MR. SLOAN: I'll accept everything you have said.

MR. VERWYS: Go ahead.

MR. SLOAN: Thanks for the help.

A. This is a Rockwell yoke on this end with a one inch bore keyway and set screw, no pin hole, which is not the way we sell them to Hutchinson.

* * *

Q. We have covered pretty much – unless you want to point something else out. Is there anything else?

A. We always put a sticker on this tube, safety sticker that tells you to not operate it without the shield on it.

Q. I see. As I see it here, I don't see any evidence of that sticker on there.

Now, would you know whether or not that sticker came off or what?

A. I know that we always put them on ours and they are very hard to get off because they are wrapped completely around and sealed to themselves.

Q. How are they put on, with glue of some sort?

A. No, it's a special plastic sticker. I don't know what the, all the components are in it but I know it's very tough to get off.

Q. Do you know whether or not they can be get off?

A. I'm sure they could be gotten off, they could be removed with a knife.

Q. What does the sticker say?

A. I think it says, don't operate without shields.

* * *

Q. Let's go to No. 5 and hope we don't get in trouble on No. 5 because I'm going to ask the same question.

MR. VERWYS: You won't get in trouble if you only ask it once and you listen to the answer.

Q. It doesn't have a pin hole?

A. No, it doesn't have a pin hole.

Q. How does Exhibit 5 differ?

A. This again, the weld on this exhibit that holds the bar into the universal joint is uneven in nature and, therefore, I think, is a hand weld.

Q. Are you positive?

A. It's not a machine weld.

Q. Are you positive it is?

A. Yeah. If you notice, it's way smaller here than on the other sides.

Q. What else?

A. And the other thing is that we never purchased any Rexnord yokes or universal joints.

Q. You are saying never. How can you be sure?

A. That, I know.

* * *

CROSS EXAMINATION

BY MR. VERWYS:

Q. I have got a couple.

Look at the universal joint end of Exhibit 5. Again, do you see any evidence of white paint on that universal?

MR. SLOAN: That's objectionable. The jury itself can look at that one way or the other.

MR. VERWYS: The jury is hopefully never going to get to see this case.

MR. SLOAN: What it sees isn't important.

A. I don't see any white paint.

Q. If this had been a universal joint incorporated in a drive shaft produced by G & G, would it have been painted white?

A. Yes, sir.

Q. Are there two different knuckle or universal joint manufacturers represented on this one PTO shaft?

A. Yes.

Q. Has G & G ever manufactured and marketed and distributed a shaft with a universal joint from two different manufacturers?

A. Not that I know of.

Q. So based upon your examination of this shaft, Exhibits 4 and 5 today, what is your opinion as to whether G & G ever designed, marketed and distributed or sold either end of the shaft?

A. I don't believe we made either end of that power shaft.

Q. Did you design either end?

A. No.

Q. Did you market either end?

A. No.

Q. Did you manufacture either end?

A. No.

UNITED STATES OF AMERICA IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

HAROLD MANN AND
JEAN MANN,

Plaintiffs,

v.

HUTCHINSON DIVISION,
LEAR SIEGLER, INC., et al.,

Defendants.

File No.
K84-71 CA4

FILED
1986 MAY 13

ORDER REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY

On April 14, 1986, a hearing was held before me on plaintiffs' motion to compel production of documents and witnesses, and the response of defendant G&G Manufacturing, Inc. (G&G) in opposition to the motion. At the conclusion of the hearing, I announced by [sic] decision on the motion on the record. Since defendant G&G had for the most part prevailed in its position, I requested its counsel to submit a proposed order.

On April 17, 1986, counsel for defendant G&G submitted a proposed order. On April 21, 1986, counsel for the plaintiffs advised me that he disagreed with the terms of the proposed order. Accordingly, I directed both counsel by letter to confer and make a good faith attempt to reach agreement on the terms of the order. Counsel was further advised that if agreement could not be reached by May 6, 1986, a hearing would be held on May 7, 1986, to settle the order. The hearing was adjourned to May 9, 1986, by mutual consent.

On May 9, 1986, counsel met with me as scheduled. Counsel agreed to meet in my office to determine whether agreement could be reached on the terms of the order. In spite of a good faith discussion, no agreement could be reached with one exception, namely, that defendant G&G will answer plaintiff's Fourth Supplemental Interrogatories To Defendants, which were filed on February 24, 1986, and to which objections had heretofore been filed by defendant G&G.

Accordingly, I hereby reaffirm my ruling on plaintiff's motions as stated on the record in open court on April 14, 1986, but modified by the agreed exception referred to above. For the reasons stated on the record, plaintiffs' motion is denied. Until further order of the court, plaintiffs shall limit their discovery to the issue of whether defendant G&G manufactured the PTO shaft and/or guard in question. Defendant G&G shall answer plaintiffs' Fourth Supplemental Interrogatories To Defendants as agreed at the conference of May 9, 1986.

No costs or attorney fees are assessed against either party.

IT IS SO ORDERED.

Dated: May 12, 1986

/s/ Stephen W. Karr
Stephen W. Karr
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and
JEAN MANN,

Plaintiffs,

-vs-

HUTCHINSON and G&G
MANUFACTURING,

Defendants.

---/

File No. K84-71
Civil

Grand Rapids,
Michigan
April 14, 1986
At 10:00 A.M.

EXCERPT OF MOTION
BEFORE THE HONORABLE STEPHEN W. KARR

APPEARANCES:

For the Plaintiff: JAMES SLOAN, Jr., Esq.
501 Comerica Bldg.
Kalamazoo, Michigan
49007

For the Defendants: PAUL NELSON, Esq.
5650 Foremost Dr.
Grand Rapids, Michigan
49506

Court Reporter: Joan E. Nims
492 Federal Building
Grand Rapids, Michigan
49503

* * *

THE MAGISTRATE: Well, as I see this, Mr. Sloan certainly has the right to show that G&G manufactured these, I think you called it a PTO shaft?

MR. SLOAN: Yes, your Honor.

THE MAGISTRATE: On the other hand, there is a 7 page extensive and well documented affidavit from Mr. Hergert that indicates that the shaft is not produced by G&G. And it seems to me it would be rather burdensome and oppressive to let you loose, Mr. Sloan, in the discovery process, trying to get technical data regarding the shaft and safety features and that kind of thing.

If in fact – if in fact this is not a G&G shaft, and I let you go roaming around Omaha or wherever this place is, and getting all these records, then we're doing an injustice to G&G. On the other hand, you certainly have the right to show it is a G&G shaft, and I don't know whether this is a cop-out or not, but what I want to do is this: Initially limit your discovery to gathering data regarding the issue of whether G&G is actually the culprit.

Did it manufacture the PTO shaft in question. Now I can see some problems with that. You're going to have some questions that are going to be questionable as to whether they deal with ownership or manufacture, or on the other hand whether they deal with technical characteristics or safety features.

I think this is – this course, if it can be done, is of value to both of you. Just last week, I got an opinion from Judge Enslen in which he assessed a $5,000 cost against an attorney who had a claim that was at best very questionable, and he pursued it through the discovery process and imposed burdensome costs on the parties involved, and Judge Enslen held that under these circumstances, where an attorney pursues a claim that he knows has no value, he's going to do something about it, and he assessed $5,000 against this particular attorney.

I am not saying this is the case here, but it seems to me that it's important that both of you know right off the bat here whether this part is manufactured by G&G. Now Mr. Nelson has obtained, as I say, this fairly extensive and well documented affidavit from Mr. Hergert, indicating that it's not, but that doesn't answer it.

I think you ought to have the opportunity to show that Mr. Hergert doesn't know what he's talking about. So what I want to do now is limit the discovery initially to questions along that line. I hope that can be done. I want you to try it, and if it can't be done, I suppose you will both be back here, but that's my ruling today.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN & JEAN MANN, Plaintiffs, vs. HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware Corporation, and G & G MANUFACTURING, INC., a Nebraska Corporation, Defendants.	)	No. K84-71 CA 4

Before

THE HONORABLE BENJAMIN F. GIBSON,

U.S. District Judge
October 15, 1986
Grand Rapids, Michigan
Judge's Opinion

APPEARANCES:

SLOAN, BENEFIEL, FARRER & NEWTON
By: Gary Newton
501 Comerica Building
Kalamazoo, MI. 49007-4780

On behalf of the Plaintiff;

TOLLEY, FISHER, & VERWYS, PC
By: Paul Nelson
5650 Foremost Drive
Grand Rapids, MI. 49503

On behalf of the Defendant.

* * *

THE COURT: So the issue right before the Court and before Judge Karr was primarily the issue of the scope of the discovery with respect to the shaft?

MR. NEWTON: Yes, that's correct, Your Honor.

THE COURT: Well, it appears that G & G has denied that it manufactured the shaft. Is that true? Has there been a flat out denial?

MR. NEWTON: Yes, they denied it in the pretrial order.

THE COURT: So in spite of that denial, Judge Karr has consented to limit discovery regarding the issue of whether or not, in fact, G & G manufactured the shaft. And if it did not manufacture the shaft, obviously there should be no discovery in this area. If it did, there should be complete discovery.

So the Court cannot say that the order of Judge Karr is clearly erroneous or contrary to law when he ruled that plaintiffs shall limit their discovery to the issue of whether Defendant G & G manufactured the PTO shaft. So the Court will uphold that ruling and confirm that that is the order of this Court; that with respect to the shaft, until further order of the Court, the plaintiff shall limit their discovery to the issue of whether G & G manufactured the PTO shaft. And the Court will sign an order to that effect.

* * *

. . . What the Court is doing is putting the burden on counsel, the burden on you to ask pertinent questions, a

burden on defense counsel to answer pertinent questions. And I'll make a judgment after you've made a judgment on it.

So I'm not going to give you an advance ruling on these matters. Discovery is supposed to be self-executing. I cannot go item by item now. I'm going to leave that up to you. But that means you're going to have to act in good faith. If you don't act in good faith, then the Court is going to access [sic] costs, actual costs. That's what I'm going to do.

* * *

Mr. Nelson, would you prepare an order to the effect of limiting the discovery to the issue of the manufacture by G & G of the PTO shaft?

MR. NELSON: Yes, Your Honor.

MR. NEWTON: Thank you.

MR. NELSON: Thank you.

TOLLEY, FISHER & VERWYS, P.C.
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LAWRENCE KOROLEWICZ
PAMELA J. BURBOTT
LINDA I. GLAZA-HERRINGTON

OF COUNSEL
E. DONALD WIERENGA

January 2, 1987

Mr. Fredrick J. Farrer
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007

Re: Harold and Jean Mann
vs. Hutchinson Division,
Lear Siegler, Inc., et al.
Case No. K84 71 CA4

Dear Mr. Farrer:

I have received and reviewed with my client your letter of December 16, 1986 and the enclosed Notice of Depositions for January 19, 1987.

I would point out first of all that you have attempted to set these depositions without notice to or inquiry of

my office. The times you have selected are not convenient. These depositions can begin not earlier than 1:00 p.m. on Monday, the 19th. At that time, Mr. Baber and Ms. Tucker, both officers of G & G Manufacturing, Inc., will be made available for their depositions.

Ms. Amick and Mr. Warren are simply employees of G & G and do not fall within any category under the Federal Rules of Civil Procedure which would permit the taking of their depositions simply upon notice. Upon my receipt from you of the appropriate witness and mileage fees, I will attempt to make those individuals available without the necessity of a subpoena. Mr. Smith is in the same category as Ms. Amick and Mr. Warren except that he lives and works approximately 3½ hours from Omaha. Upon my receipt from you of the appropriate witness fee and mileage, I will also attempt to make Mr. Smith available for his deposition in Omaha.

As you know, it is and continues to be our position that G & G has little if any involvement in this matter. In our view, Judge Gibson has suggested that you attempt to obtain the information you seek by less expensive and complicated measures than are involved in another trip to Omaha. You apparently do not wish to follow Judge Gibson's direction. You should, however, know before going to Omaha that I will take the same position in these depositions as I took with regard to the prior depositions of Mr. Hergert and Mr. Eipperle. That is, I will permit questioning with regard to whether G & G designed or manufactured the subject shaft, and will further permit testimony with regard to the design and manufacture of the subject guard remnant by G & G, but will not permit

any answers to questions beyond those areas, in conformance with Judge Gibson's affirmance of the magistrate's Order in this matter.

You should further be advised that I will at the appropriate time seek reimbursement of all of the expenses, attorney fees, and other costs involved in the taking of these depositions.

Finally, I would like to clear up one additional procedural detail. I do not know whether you or Mr. Sloan intends to take these depositions. In any event, I will be unable to permit any smoking in the deposition room. I have been developing an increasing sensitivity to the cigarette smoke of others and feel it is no longer beneficial to my health, or to the health of my clients, to spend the prolonged periods of time involved in depositions inhaling other persons' cigarette smoke.

Very truly yours,
Mark H. Verwys

MHV:bsa

cc James Hergert

bcc James Reed, Claim No. 69P001301

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and
JEAN MANN,

Plaintiffs,

vs.

HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation, and G & G MANUFACTURING, INC., a Nebraska corporation,

Defendants.

_____/

Case No.
K84-71 CA

FILED
1987 JAN 15

PROTECTIVE ORDER

Defendant Hutchinson Division, Lear Siegler, Inc., seeks a protective order pursuant to FRCP 26(c) protecting it from being required to respond to plaintiff's motion for production of documents relative to the sale of power take-off shafts (PTO) and guards to Hutchinson manufacturing. Defendant argues that it has previously responded to five separate sets of interrogatories and two separate requests for production of documents, and has produced two employees for discovery dispositions. This discovery, defendant contends, established that all of its PTOs and guards for the type of portable auger which is the subject of this suit came from and were sold to it by G & G Manufacturing, a co-defendant, and that the PTO shaft in question was not from G & G Manufacturing. Therefore, defendant Hutchinson Division, Lear Siegler, Inc. contends, that it will be unduly oppressive to now

require it to produce documents relating to all sales of power shafts made to it without limitation, since such information has been established as clearly irrelevant.

I am of the opinion that the defendant should prevail on this motion. After reviewing pertinent excerpts from the previous discovery conducted in this matter, which have been kindly furnished by both parties to the motion, the uncontradicted evidence is overwhelming that all of the PTO shafts and guards obtained by this defendant for this type of auger came from G & G Manufacturing, and that the PTO shaft attached to this particular auger (which was apparently a cannibalized PTO shaft attached by persons unknown) was not a G & G product.

For example, in regard to whether the subject shaft was in fact a G & G product, the question which plaintiff concedes is central to this issue, defendant Hutchinson Division, Lear Siegler has offered the testimony of Wayne Eipperle, Vice-President of Research and Development of G & G Manufacturing Company who has been with G & G thirty-eight years. Mr. Eipperle testified that he knew the subject shaft was not manufactured by G & G for a variety of reasons. First, it did not have a pinhole and the only PTO shafts supplied by G & G to Hutchinson had pinholes.

Mr. Eipperle also testified that the weld on the PTO shaft in question was a hand weld rather than the machine weld used by G & G. Mr. Eipperle's testimony in this regard must be considered quite credible since he developed machines which made the welds.

Third, Mr. Eipperle testified that the machinery in question did not contain a very difficult-to-remove safety sticker that G & G used.

Fourth, the item in question contained a Rexnord yoke. Mr. Eipperle testified that G & G never purchased Rexnord yokes for inclusion in its product.

Fifth, if a universal joint had been incorporated in a drive shaft produced by G & G, it would have been painted white, and the universal joint in question was not painted white.

Finally, the shaft in question contained a universal joint from two different manufacturers and Mr. Eipperle testified that G & G has never manufactured nor marketed nor distributed a shaft with a universal joint from two different manufacturers.

Mr. Eipperle's testimony was corroborated by that of Mr. James Herger [sic], a consultant and part-time employee for G & G Manufacturing. Both G & G employees testified their company would have purchase orders supporting their testimony.

The court recognized the broad scope of discovery normally permitted in federal civil litigation. It is not, however, boundless. Plaintiff has to date been afforded extensive discovery which has only established that no basis exists for production of the documents requested from defendant Hutchinson Division, Lear Siegler, Inc. In the absence of any facts to the contrary, the further discovery sought from this defendant would be oppressive and unduly burdensome. Accordingly, defendant

Hutchinson Division, Lear Siegler, Inc., motion for a protective order is granted.

IT IS SO ORDERED.

Entered: 1/14/87

/s/ Hugh W. Brenneman, Jr.
Hugh W. Brenneman, Jr.
United States Magistrate

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OF COUNSEL
E. DONALD WIERENGA

January 20, 1987

Fredrick J. Farrer, Esq.
SLOAN, BENEFIEL, FARRER, NEWTON
& GLISTA
501 Comerica Building
Kalamazoo, MI 49007

Re: Mann V. Hutchinson, et al
Case No.: K84-71-CA4
Our File No.: 55-4490-5

Dear Mr. Farrer:

I am writing to follow-up on our Objections to your request for production of documents included in the amended notices of deposition dated January 8, 1987. Our objections were filed on January 13, 1987.

Since the filing of those Objections, we have received the Protective Order filed by Judge Brenneman on January 15, 1987. It is our belief that the Protective Order

resolves the issue of whether we are required to produce documents regarding PTO shafts produced by G & G Manufacturing for all intents and purposes. We feel that if the issue were presented to Judge Brenneman with regard to G & G as opposed to Hutchinson, the result would be the same and G & G would not be required to produce these documents.

For this reason, in addition to the reasons already stated in our Objections, we want to reiterate that we will not be producing any documents regarding PTO shafts manufacturing by G & G when the Omaha depositions are taken. If you have any questions regarding this matter, please do not hesitate to call Mark Verwys or me.

Very truly yours

TOLLEY, FISHER & VERWYS, P.C.

/s/ Paul L. Nelson
Paul L. Nelson

PLN/jlh
cc: Hon. Benjamin F. Gibson
Robert C. Mabbitt, jr.
James Hergert
bcc: James Reed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,	)	
Plaintiffs,	)	Case No.: K84 71 CA4
-vs-	)	
HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware corporation, and G & G MANUFACTURING, INC., a Nebraska corporation,	)	
Defendants.	)	

Deposition of HAROLD MANN taken under the provisions of the Federal Rules of Civil Procedure before Marjorie A. Covey, (CSR 2616), Certified Shorthand Reporter and Notary Public, at 501 ComericA Building, Kalamazoo, Michigan on Monday, February 2, 1987 at 10:00 o'clock a.m. pursuant to Notice.

APPEARANCES:

FOR THE PLAINTIFF: MR. FREDRICK J. FARRER
501 ComericA Building
Kalamazoo, Michigan 49007

FOR DEFENDANT HUTCHINSON:
MR. CURTIS MABBITT
200 Oldtown Riverfront Building
248 Louis, N.W.
Grand Rapids, Michigan 49503

FOR DEFENDANT G & G:

MR. MARK H. VERWYS
5650 Foremost Drive, S.E.
Grand Rapids, Michigan
49506

* * *

Q. I thought maybe it was a real big farm. Did your grandfather help your mother farm her farm while you were growing up too?

A. Yes.

Q. Did he ever show you how to use equipment?

A. Oh, yes.

Q. What kind of things do you recall him telling you about power take-off shafts, if anything?

A. Pardon?

Q. Do you recall your grandfather ever telling you anything about power take-off shafts and how to use them safely?

A. Yes.

Q. What did he tell you?

A. You're supposed to use the shield and keep away from moving parts with your clothes.

* * *

Q. So I presume then and correct me if I'm wrong that when you bought new equipment it came with the power take-off shaft?

A. Yes.

Q. And did it probably come with a guard, whatever they had at that point?

A. Yes. The old-style guards. I know the first machine I bought had the old-style guards, just like an umbrella, I told you, that telescopes just like the shaft.

Q. And you would use those whenever you used your equipment?

A. Yes.

Q. Why?

A. So you wouldn't get caught in the machine, to help you from getting caught.

Q. Did your grandfather or anybody else up to the time you started your own farm, ever warn you about wearing baggy clothes, loose clothing around farm equipment?

A. Yes.

Q. Same reason again, because you don't want to get caught?

A. Right.

Q. Did anybody ever tell you about the danger of projections, that is things sticking out from moving equipment that might catch on to your clothing?

A. Yes.

Q. Things like bolts and sharp pieces of metal and so on?

A. Yes.

Q. You knew that that was an extra hazard, if you will?

A. Yes.

* * *

Q. From '52 to '82 did you subscribe to or regularly read any magazines related to farming?

A. Oh, yes.

Q. Could you name some of those?

A. Farm Journal, Prarie [sic] Farmer, Michigan Farmer, Successful Farmer.

Q. Okay. Any others?

A. There probably is.

Q. Now are these magazines that you would subscribe to or receive at the house?

A. Yes.

Q. And you'd read through them?

A. Yes.

Q. Did any of those magazines that you can recall from '52 to '82 have any article about farm safety in general?

A. Oh, yes. They all do.

Q. Almost every month?

A. I'm sure, yes.

Q. Some of those magazines, as I understand it, have columns about safety on the farm every month, is that right?

A. Yes.

Q. And did you read those?

A. Oh, yes.

Q. Now you may not specifically recall any particular articles, but do you recall whether or not those – any of those magazines generally in that 30-year period dealt with safe use of power take-off shafts?

A. I'm sure they did. They're just generally safety – they talk – not just the shaft, any moving parts or any moving gears, or running the machine, working on it running and that sort of thing.

Q. If I understood your answer then those articles probably talked generally about guarding all moving equipment and all moving parts, correct?

A. That's right. But a lot of these shafts and stuff can't be guarded. You take like on a corn head, they can't guard them so they have to be left open so they don't want you getting off with the machine running.

Q. So you can recall reading articles that specifically talk about the dangers of parts that can't be guarded?

A. Right.

Q. But now generally a power take-off shaft doesn't fall into the category of equipment that can't be guarded?

A. Right.

Q. That can be guarded?

A. Like I said, a corn head they don't because of the position and the weeds and stuff, what have you. They have tried to guard them and it doesn't work.

Q. But when we're talking about power take-off shafts, that is something that at least by 1982 was generally considered to be a piece of equipment, moving equipment that could be guarded?

A. Right.

Q. And should be guarded?

A. Right.

Q. And had to be guarded?

A. Right.

* * *

Q. Yes. At the time you got hurt there was half of a guard on, is that correct?

A. That's right. About two-thirds of a guard.

Q. Well, one end?

A. One end.

Q. Was that on there when you bought it?

A. Yes.

Q. So at no time that you owned that was there a complete guard on it?

A. No. Yes, I should say yes, because there is now. I changed the shaft.

Q. Okay. At no time before your accident was there a complete guard?

A. That's right.

* * *

Q. Roughly, give or take a year. Would it be fair to say then that at least your son had somewhere between maybe 12 and 15 years of experience with farm machinery at the time of your accident?

A. Yes.

Q. Who taught him how to use farm machinery safely?

A. I did.

Q. Did you ever have any discussion with him before 1982 about the safe use of power take-off shafts?

A. Yes.

Q. And how many times would you say you talked to him about that?

A. Oh, unknown.

Q. More than once?

A. Yes. Several.

Q. What did you tell your son about how to safely use a power take-off shaft?

A. About to stay away from moving parts, keep the shield in place.

Q. Same thing your granddad taught you?

A. Right.

Q. Now I don't want to belabor the obvious here but is it fair to say that at the time you got hurt you were not following your granddad's advice?

A. Yes.

Q. And is it fair to say that at the time you got hurt you weren't following the advice that you were giving to your son?

A. Yes.

Q. And is it also fair to say that if you had followed your granddad's advice, or the advice that you gave your son, that you probably wouldn't have been hurt?

A. Yes.

* * *

Q. You told Mr. Mabbitt that you recall seeing warnings about keeping clothing out of moving parts and maybe even keeping shields in place, correct?

A. Yes.

Q. Is that part of – this is going to be kind of an awkward question. You didn't really need to see warnings to know that, did you?

A. No.

Q. Your granddad had told you that long before anybody thought about sticking warnings on things, correct?

A. Yes.

Q. And even though there are warnings on things you thought it was important to tell your son the same thing?

A. Yes.

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March 11, 1987

Mr. Fredrick J. Farrer
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
Kalamazoo, MI 49007

Re: Harold and Jean Mann
vs. Hutchinson Division, Lear Siegler, Inc., et al.
Case No.: K84-71-CA4
Our File No.: 55-4490-5

Dear Mr. Farrer:

I have received, as have you, a copy of the mediation clerk's letter of March 6, 1987 to the effect that both defendants accepted the mediation award and plaintiffs rejected the award. The purpose of this letter is to notify you that G & G will be relying upon the cost recovery

provisions of the rules in the likely event that plaintiffs do not achieve a verdict of sufficient magnitude.

G & G anticipates that its expenses through trial will exceed $15,000. The full amount of expenditures for defense of this claim will be sought from those persons liable under the rules.

It is my understanding that Mr. and Mrs. Mann are collectible and that they have unencumbered assets sufficient to satisfy a cost judgment of $15,000 to $20,000. Please make immediate inquiry of your clients to establish this fact and let me know in writing so I can seek a bond for costs, if necessary.

Thank you.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV:bsa
cc R. Curtis Mabbitt, Esq.

bcc James Reed, Claim No. 69P001301
James Hergert

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs,

No. K84-71 CA4

vs.

HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware Corporation, and G & G MANUFACTURING, INC., a Nebraska Corporation,

Defendants.

DEPOSITION OF WESLEY BUCHELE

* * *

Q. We will get to what you are going to tell them about this material. I want to know whether you are going to tell a jury in Grand Rapids in 10 days that plastic is not a suitable material for use in PTO shaft guards?

A. I told you what I am going to do. I am going to talk about this one here.

Q. I will try one more time. Are you going to tell them that plastic is not a suitable material for PTO shaft guards?

A. Some plastics could be a suitable material.

Q. Fine. So you are not going to tell them generically that plastic shouldn't be used in PTO shaft guards?

A. No.

Q. All rights. So that some plastics are suitable for use in PTO shaft guards?

A. Well, I haven't seen all the plastics in the world.

Q. I didn't ask you whether you had, sir. I asked you whether or not you would agree with the statement that some plastics are a suitable material to use to make PTO shaft guards?

A. Well, I have seen the black plastics that are, that seem to be suitable for that purpose.

Q. Okay. So there are some that are suitable, in your view?

A. Well, in my opinion, that's true.

Q. All right. You're not just critical of the use of plastic. I take it that you are critical of the use of the particular plastic in the G & G guard?

A. Well, that's – that would be what I'm critical of. The others, I would have to do testing and stuff like that. I haven't observed them to see whether they deteriorate. The ones that I have seen, the John Deere, over the years have not deteriorated. So that's the only one I can make a comment about. And I have seen it from time to time.

Q. All right. So you're not going to come into court and tell the jury that you think a metal guard is better than a plastic guard, or a plastic guard is better than a metal guard, or anything like that?

A. No, I don't believe I will.

Q. Okay. What you are going to tell them, I take it, with regard to the material of this guard, is that you don't

think that this material was suitable for use in a PTO shaft guard, whatever it is that G & G used?

A. That's true.

Q. Okay. Why is this plastic in this PTO shaft guard not suitable?

A. Well, I have studied the – I have looked at a number of power take-off shafts that are using this material, and I find that they do not have a long life. That they crack and break. And do not provide a permanent shielding or guarding system for the power take-off shaft.

Q. Was this partial guard remnant sold by G & G with Mr. Mann's shaft?

A. I can't be positive that it was, one way or the other.

Q. All right. So as far as you know G & G did not intend with this partial guard remnant to guard Mr. Mann's power take-off shaft, did they?

A. It could have done the job.

Q. I didn't ask whether it could have. I asked you whether or not you are going to testify that G & G intended this particular guard remnant to guard this particular shaft?

A. The only thing I can testify to is that it would fit on the shaft, and it could be assembled there as they intended to have it assembled.

Q. I understand that. But you are also going to testify that you believe that this particular shaft guard

should have had a sufficient life to protect this particular shaft. And I want to know the basis for that opinion?

A. I think you can look at it and determine that.

Q. I can't at all. Can you tell me when this particular shaft was made or assembled?

A. Where it was made and assembled?

Q. When?

A. No.

Q. Can you tell us me when this particular guard remnant was made and assembled?

A. I haven't testified that they were made and assembled at the same time.

Q. Then how can you testify that this particular guard remnant was intended by G & G or should have been intended by G & G to protect this particular shaft for its life?

A. I don't think that's a question.

Q. That's my question. That's your testimony. I would like an answer to my question. How can you testify – do you understand the question?

A. I can testify that that guard was designed to be assembled onto a shaft.

Q. Which shaft?

A. Such as you have there.

Q. Okay.

A. And to provide protection of that shaft while the shaft was rotating.

Q. Right. That's not what you said a minute ago. What you said a minute ago was that this particular piece of guard remnant was not suitable because it didn't have a life of the same length as this particular shaft that injured Mr. Mann. And I want to know the basis for that opinion?

MR. FARRER: For the record, I object, I don't think he said that. And I wrote down exactly what he said and it wasn't that. You can have the record read back, but I think you're putting words in his mouth.

Q. I would never try to do that to a witness.

A. Well, read it back.

Q. Can you answer the question or not, sir?

A. Read it back.

Q. On what basis are you testifying that this particular guard remnant was intended by G & G to protect Mr. Mann's particular shaft, assembled shaft, for any length of time?

A. I have already testified to that.

Q. I don't think, you have.

A. I have testified –

Q. Tell me again?

A. I have testified that I have no way, sitting here today, to say that that guard was assembled on that shaft by G & G in Omaha, Nebraska.

Q. Okay. How long a life did this particular guard remnant have?

A. I don't know when it was – I don't know when it was manufactured.

Q. How long a life was this particular guard remnant intended to have?

A. The same life as the shaft.

Q. As what shaft?

A. Of any shaft it was assembled on.

Q. What is the life of any shaft that it's assembled on?

A. I don't know. It might be 50 years. I don't know.

Q. Maybe one year?

A. It would be more than one year, generally.

Q. Maybe three years?

A. It would be a lot longer than that.

Q. Well, what if it gets broken?

A. What?

Q. The shaft?

A. The shaft? Well, if the shaft gets broken, it's broken.

Q. And then the guard has outlived the shaft, hasn't it?

A. That isn't the way it happens.

Q. I didn't ask you that. Well, you tell me how it happened in this case. I don't care about how it happens. I want to know about Mr. Mann. And I want to know how you are going to come in – on what basis you're going to tell the jury that this particular guard remnant didn't have a long enough life to protect this particular shaft, when you have already admitted that you can't tell us who made this shaft, you have admitted that it's an assembled shaft by somebody, probably not a manufacturer, and you have no idea when the guard remnant was made, and you have no idea who put the guard remnant on the shaft?

A. I don't think I have testified to all that.

Q. Okay. Well, we will find out 10 days from now. But I think you have. You see, we don't have a case here, do we, where a shaft and a guard were sold by one manufacturer, correct?

A. Well, that's up for a jury question, because of the fact that –

Q. No, its not up for a jury question. It's already been determined that this shaft did not come from G & G. That's been judicially determined. So that's not a jury question.

MR. FARRER: I beg to differ with you. It has not been judicially determined that that shaft was not manufactured by G & G. There is no order, no ruling on that. There is some dicta in some magistrate's opinion on that.

MR. VERWYS: Well, I am not going to argue here what Judge Gibson did last week by dismissing Hutchinson, but I don't know of any other basis that he could

have done that except to determine that this was not a G & G shaft.

Q. (MR. VERWYS) So you're going to come in, sir, just so I understand your testimony now, and you're going to testify that the guard remnant that was on this particular shaft on the day of Mr. Mann's injury did not have a long enough life to protect this particular shaft, that's your testimony?

A. That or any other shaft.

Q. How long a life did this guard remnant have?

A. I have already testified I don't know when it was manufactured.

Q. So whatever life it had it wasn't long enough?

A. That's true.

* * *

Q. Okay. Did Mr. Mann appreciate the risk involved in operating this particular shaft with only a partial guard remnant on it?

A. Well, I don't know exactly whether he appreciated it or not.

Q. Well, you read his testimony, didn't you?

A. Most people running or walking down a street, or working on a street or so, do not appreciate the risk that's involved.

Q. Okay. So that the average farmer, even with several years of experience operating equipment, does not have the sophistication necessary to assess the risk involved with a spinning shaft, correct?

A. I don't believe they do.

Q. All right. Did Mr. Mann have the ability to do that?

A. I don't think he did.

Q. Have you read his testimony, sir?

A. I read his testimony.

Q. You don't remember what he said, that he fully appreciated this danger, both before the accident and for years before the accident?

A. I know I have read a farmer saying that, but they don't really do that. They don't really have that appreciation. They can be talked into believing they do, but they don't have that appreciation.

Q. Are you suggesting that I talked him into believing that?

A. When you ask a question, why he had to answer the way you wanted him to answer.

Q. He did?

A. Sure.

Q. Do you have to answer the way I want you to answer?

A. No.

Q. Does any witness?

A. Well, based on the question. The question demands an answer.

Q. Well, isn't the answer to, did you appreciate that you could get your clothing caught in that shaft if you got close to it, isn't that a question that can be answered yes or no?

A. I don't think he appreciated the risk of this shaft.

Q. So when he testified under oath in response to my questions he was not telling me the truth?

A. I think he was trying to tell you the truth.

Q. But he wasn't telling me the truth?

A. I don't think so.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs,

No. K84-71 CA4

vs.

HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware Corporation, and G & G MANUFACTURING, INC., a Nebraska Corporation,

Defendants.

DEPOSITION OF DALE GUMZ

* * *

Q. Now, other than the opinion with regard to the accident reconstruction, have you formulated any other opinions with regard to this matter?

A. I would have an opinion in regard to the cause of the accident.

Q. And what was the cause of the accident, in your opinion?

A. The accident and injury was caused by improper maintenance of the equipment. And unreasonable operation and supervision or self-supervision of the operation during the time of the accident or just prior to the accident.

Q. What operation are you referring to?

A. The operation, the entire operation of unloading the corn from the truck.

Q. What about the operation do you feel to be unreasonable?

A. One of the items would be conducting the operation at all with the equipment on, which it would need to be to do that operation, with the equipment in the poorly maintained condition that it was in.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs,

No. K84-71 CA4

vs.

HUTCHINSON DIVISION, LEAR SIEGLER, INC., a Delaware Corporation, and G & G MANUFACTURING, INC., a Nebraska Corporation,

Defendants.

DEPOSITION OF WILLIAM E. FIELD

* * *

Q. Okay. Now, what opinions do you hold with regard to this case?

A. Well, I think I can summarize them by saying that I feel that, feel quite strongly that the Plaintiff in this case has little grounds to charge or to suggest that G & G was somehow negligent in the design, fabrication or installation of this particular drive line.

Q. Would that be a summary of all of your opinions you hold with regard to this case?

A. Yes, I would say that would be a summary.

Q. Let me ask you to be a little more specific. Why do you believe that the Plaintiff has little grounds to suggest that G & G was negligent in the design, fabrication and manufacture of the drive line?

A. Well, there are several issues there. One might begin with the working environment and that the setup of the loading equipment and the auger bin arrangement contributes to a potential exposure to hazardous equipment or to equipment that has a potential for injury, and it could have been done differently to avoid some of that.

Secondly, the equipment that was being used at the time was unguarded and presented a very real risk or hazard to anybody that might be using that equipment. Not only the Plaintiff, but anybody that might have been employed by that Plaintiff or any family member or anybody that might have been out and exposed to the equipment.

Thirdly, the composition of the drive line is suggested that it's manufactured by G & G when, in fact, it appears that it is not. I would have a fourth point in that the availability of replacement shielding is easy and there is no hinderance to the Plaintiff in obtaining the missing components that would have made it an appropriately safe drive line.

Q. Does that about cover it?

A. Yes.

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April 23, 1987

Mr. Fredrick J. Farrer
SLOAN, BENEFIEL, FARRER, NEWTON & GLISTA
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007

Re: Harold and Jean Mann
vs. G & G Manufacturing, Inc.
Case No. K84 71 CA4
Our File No. 55-4490

Dear Mr. Farrer:

This letter will respond to your recent settlement demand of $50,000. As I explained to you during our telephone conversation, my client will not pay any amount in settlement of this claim and, in fact, has instructed me to pursue all available avenues of cost and fee recovery against you and your clients.

As you know, Local Rule 42 (Mediation) provides, in pertinent part, as follows:

> (3) If the mediation panel's evaluation is unanimous and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent greater than the evaluation in order to avoid the payment of actual costs to the defendant.

The Rule goes on to state:

> (k) *Actual Costs* – Actual costs include those costs and fees taxable in any civil action and attorneys fees for each day of trial as may be determined by the Court.

G & G accepted the unanimous mediation award of $37,500. Your clients rejected that award. If this matter proceeds to trial, G & G will, at a minimum, be entitled to reimbursement of its actual costs and attorney fees for each day of trial. It is my expectation that this matter will take at least four days to try. At a billing rate of $95 per hour, the attorney fees for actual time spent in Court, exclusive of time spent meeting with and preparing witnesses, will be in excess of $3,000. In addition, the costs of bringing Mr. Field, Mr. Hergert, Mr. Gumz and any additional witnesses to Grand Rapids for testimony will total at least another $4,500. When miscellaneous taxable costs, including the costs of any depositions used at trial and the cost of videotape apparatus are added, G & G's total trial expenses could approach $10,000.

In addition to the local mediation rule, I presume you are familiar with Federal Rule 11 which provides, in pertinent part:

> The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of exisint [sic] law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> * * *
>
> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In this case, it appears that your firm did a substantial amount of investigation prior to commencing suit. Based upon that investigation, including the admissions of Mr. Mann, you knew or should have known that G & G has no liability in this matter. The filing of this complaint has caused G & G to incur, to date, a total of $25,351.61 in attorney fees and costs, excluding the fees and costs of the most recent depositions in Iowa. Given Judge Gibson's apparent view of this matter, I believe that there is a reasonable likelihood that he could be persuaded to

award G & G an additional sum under Rule 11, in excess of $10,000 should G & G obtain a no cause verdict at trial.

Finally, 28 USC 1927 states as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.

You have indicated that your firm has incurred approximately $35,000 in costs and expenses in pursuing this matter. I believe such information will support G & G's claim that this case was unreasonably and vexatiously pursued.

I am prepared to recommend to G & G that it accept $12,675 as partial reimbursement for its costs and attorney fees incurred in defense of this claim, together with a full and complete release and dismissal of the Manns' complaint with prejudice. I would appreciate it if you would discuss this offer of settlement with your clients at your earliest opportunity and let me know their response.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV:bsa

cc James Hergert

bcc James Reed, Claim No. 69P001301

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WILLIAM R. VANDER SLUIS
THOMAS M. BARNHART, II

December 22, 1987

FACSIMILE NO.
(616) 942-4677

Fredrick J. Farrer, Esq.
SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007-4780

Re: Mann v G & G Manufacturing, Inc.
Our File: 71-4490

Dear Mr. Farrer:

I have received and discussed with my client your letter of December 14, 1987. Neither G & G nor its insurer are willing to agree to a dismissal with prejudice without reimbursement of at least a portion of their costs.

As you will recall, I wrote to you on March 11, 1987, notifying you that G & G intended to rely upon the cost

recovery provisions of the Federal Rules and further forecasting expenses through trial of between $15,000 and $20,000. Thereafter, the expenses of the depositions of Dale Gumz and Wes Buechle were incurred.

I wrote to you again on April 23, 1987, indicating that as of that time G & G had incurred attorney fees and costs of $25,351.61 and suggesting settlement by payment to G & G of $12,675, one-half of the total amount incurred by G & G. My letter also suggested that in addition to mediation sanctions, my client would be pursuing sanctions under Rule 11.

In response to your most recent letter, I have reviewed G & G's expenses as a result of this litigation. Fees and costs to date paid and billed by this firm total $32,373. That amount does not include a bill from Dale Gumz in the amount of $3,341.68 which was paid directly by G & G and its insurer. I have not yet received bills for Bill Field's deposition; however, this firm's work-in-process fees and costs through December 15, 1987, which will be billed at the end of this month, total approximately $1,473.27. Of the total defense expenses to date ($37,187.95), approximately $17,727.62 has been incurred since plaintiffs' rejection of the mediation on February 19, 1987.

I anticipate attorney fees and costs from now through trial between $12,500 and $17,500, including experts fees and expenses. Thus, if G & G prevails at trial, as I expect that it will, G & G and its insurer will be seeking mediation sanctions in the amount of at least $32,727.62. If Judge Bell is receptive to a Rule 11 claim, the total amount sought will be at least $52,187.95. The amount

sought will be based upon my actual billed attorney fees at the rate of $95 per hour, an amount Judge Bell termed at the final pretrial conference to be on the low side for competent trial counsel such as are involved in this case. Further supporting the reasonableness of the defense costs and fees to date of approximately $37,000 is the fact that as of April, 1987, your firm had incurred approximately $35,000 in costs and expenses in pursuing this matter.

Contrary to my recommendations, G & G and its insurer are willing at this time to agree to a stipulation and dismissal with prejudice upon the payment by your clients of $9,000, representing one-half of the defense costs incurred since rejection of the mediation on February 19, 1987. In the alternative, at your clients' option, G & G and its insurer will agree to entry of a judgment of dismissal, with prejudice, which specifically reserves G & G's right to seek its costs in a proceeding before Judge Bell.

I will be out of the office between December 24, 1987 and January 3, 1988. This offer will remain open until noon on December 31, 1987. I would appreciate it if you would give your clients' response to this offer by noon on December 31 to my secretary, Heidi.

Very truly yours,

/s/ Mark H. Verwys
Mark H. Verwys

MHV/hak

bcc: James Hergert
James Sirvio
Claim No.: 69P0001301

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiff,

v

G & G MANUFACTURING, INC., a Nebraska corporation,

Defendants.
_____/

Hon. Robert Holmes Bell

Case No.: K84-71-CA4

JUDGMENT FOR COSTS AND SANCTIONS

James Thomas Sloan, Jr.
(P-20583)
Fredrick J. Farrer
(P-25361)
Attorney for Plaintiffs

Mark H. Verwys
(P-23803)
Paul L. Nelson
(P-33605)
Attorneys for
G & G Manufacturing
5650 Foremost Drive, S.E.
Grand Rapids, MI
49506-7081
_____/

At a session of said Court held in the Federal Building in the City of Lansing, County of Ingham, State of Michigan, this 9 day of May, 1988.

PRESENT: HON. ROBERT HOLMES BELL
U. S. District Judge

Defendant's Motion for Imposition of Costs and Sanctions was heard on April 26, 1988. Prior to that hearing, this Court carefully reviewed the entire court file. Based upon that review, this Court finds that Rule 11, Fed. R. Civ. P, was violated by each attorney who signed any pleading or appeared at any proceeding on behalf of plaintiffs, for the reasons more fully set forth in its oral opinion of April 26, 1988.

IT IS THEREFORE ORDERED that judgment for defendant's attorney fees and costs in the amount of Forty Thousand Four Hundred Eighty-seven and 61/100 Dollars ($40,487.61) is entered in favor of defendant G & G Manufacturing, Inc. and against attorneys James Thomas Sloan, Jr. (P-20583), Fredrick J. Farrer (P25361), and Gary C. Newton (P-29962), and against the law firms or former law firms of Sloan, Benefiel, Farrer, Newton & Glista and Sloan, Newton & Stevens, jointly and severally.

ROBERT HOLMES BELL

Hon. Robert Holmes Bell
U. S. District Judge

Certified As A True Copy
C. Duke Hynek Clerk
By /s/ Illegible
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date May 10, 1988.

AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY

As Amended

* * *

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

* * *

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

* * *

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

* * *

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense it if [sic] can be supported by good faith argument for an extension, modification, or reversal of existing law.

* * *